INTERNATIONAL COMPETITION IN THE STEEL INDUSTRY

HEARING

BEFORE THE

SUBCOMMITTEE ON ECONOMIC AND COMMERICAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

SEPTEMBER 30, 1993

Serial No. 17

Printed for the use of the Committee on the Judiciary

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INTERNATIONAL COMPETITION IN THE STEEL INDUSTRY

THURSDAY, SEPTEMBER 30, 1993

House of Representatives,
Subcommittee on Economic and Commercial Law,
Committee on the Judiciary,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 2141, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Robert C. Scott, Melvin L. Watt, Hamilton Fish, Jr., Charles T. Canady, Bob Inglis, Bob Goodlatte, and Carlos J. Moorhead.

Subcommittee staff present: Cynthia W. Meadow, counsel; George P. Slover, assistant counsel; Perry Apelbaum, assistant counsel; Carrie Bedwell, assistant counsel; Catherine S. Cash, research assistant; Deloris L. Cole, office manager; Suzanne Young, secretary; full committee staff: Jonathan R. Yarowsky, general counsel; Alan F. Coffey, minority chief counsel; and Roger T. Fleming, minority counsel.

OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. Brooks. The subcommittee will come to order.

We are meeting today to review the current competitive position of the U.S. steel industry in world trade. This hearing is not an academic exercise; it comes against a backdrop of disturbing and persistent allegations by U.S. steelmakers and others of anti-competitive and unfair trade practices by foreign companies and their governments. Specifically, U.S. steelmakers have alleged that foreign steelmakers have entered into private cartel arrangements to limit competition within their home markets and regional markets.

The hard, cold, economic fact is that, while traditional U.S. steelmakers have been in decline for over a decade, new steel companies have emerged all around the world shipping not only to markets within their own countries and surrounding areas but coming into this country as well.

The statistics are telling: Whereas two-thirds of all steel used in the world was manufactured in the United States at the end of World War II, today U.S. steelmakers produce a mere 12 percent of all steel manufactured in the world. Added to this depressing trade picture is that the United States now imports 17 percent of its steel requirements.

It was highly fashionable in the 1980's to blast the industry for its shortsighted failure to respond rapidly to new international realities to retool outmoded equipment and techniques, to commit the needed capital to R&D in order to keep pace with German, Japanese, and South Korean companies. But that was 10 years ago. Since that time, many outside observers note that U.S. companies did, indeed, get the message, shaped up, and are meeting the competition head-on.

Then what is the problem? Unfortunately, when one starts such an inquiry, the word "cartel" keeps cropping up over and over again. We hear it from the U.S. companies, but we also hear it from others.

If, in fact, secret foreign cartels were formed to block U.S. access to other markets and to dump, below cost, their excess steel here in America, then there is at least one Congressman who is not going to go quietly into the night without getting to the bottom of the situation.

This has been true for about 12 years, to my knowledge. It is noteworthy that the U.S. steelmakers chose to file a trade petition instead of an antitrust case. Perhaps they do not believe the antitrust laws have never been violated, only the antidumping statutes. But perhaps they do not believe that the antitrust laws can work for them any longer, after witnessing another major U.S. industry, the television and consumer electronics industry, fall victim to predatory conduct of the Japanese in the 1970's and the 1980's.

What happened? The Reagan Justice Department took the side of the foreign company and foreign defendants in court; open court.

Now we have a very distinguished group of witnesses to provide this subcommittee with guidance, information in this area. Yet, I should note that the witnesses who have refused to accept an invitation to come and testify before the subcommittee have made a statement. They were representatives of the Japanese steel mills and the Korean mills and the European Community steel mills and some of the wholesaling importers who understandably are happily wedded to the subsidiaries of foreign steel mills.

Now you would think that even the lawyers representing those people are generally willing to come to testify anywhere about what they want to do. But even their lawyers didn't want to show up. It was interesting. It is an interesting message. You know, very seldom do the lawyers representing interests refuse an opportunity to tell you how wonderful their interests are.

Well, hopefully, the empty chairs and the extra room at the table will be filled very soon in order to foster our examination of this question.

Mr. Fish, did you have an opening statement?

Mr. FISH. I do, Mr. Chairman.

Mr. Chairman, I am pleased that we are holding this hearing today. The issue of fair competition is always an important one, and it is becoming increasingly critical in the area of international trade.

Recent rulings by the International Trade Commission regarding our domestic steel industry have underscored shortcomings in our international trade statutes themselves and in how they are being applied and enforced by our Government.

I share our steel industry's disappointment with the ITC's determinations, especially in the light of findings by the Commerce Department regarding the existence of substantial subsidy and dumping margins. I know that the American steel industry has, during the past 10 years, been through a painful period of adjustment and this adjustment has resulted in a stronger and more efficient U.S. industry.

If that industry is capable of competing domestically and internationally except for the effects of unfair and illegal trade practices by other foreign competitors, then our laws must be strengthened to allow redress for those practices. Our current countervailing duty and antidumping statutes are powerful tools by which we can counter unfair trade practices. However, the effectiveness of any statute is contingent about how well it is enforced.

I hope, Mr. Chairman, that our hearing this morning will shed further light on how these trade statutes may be further strengthened to help our domestic industries. I look forward to your testimony.

Thank you.

Mr. BROOKS. Thank you very much.

I first want to comment on Congressman John Murtha. He is the distinguished chairman of the Appropriations Defense Subcommittee and now on the floor handling his bill as we speak. The rule is up, right this minute; they are going into general debate. Mr. Murtha is also chairman of the Steel Caucus and, as you say, defender of the faith. We are delighted to recognize his contribution to steel and ask unanimous consent to put his statement in the record.

[See appendix.]

Mr. SCOTT. I have nothing to say. Thank you.

Mr. BROOKS. With that, this morning I would ask the witnesses to appear at the witness table as a panel as you are now.

Gentlemen, to save time, I request that each witness summarize his statement in about 5 minutes, if you can. After you have completed your statements, the subcommittee will address the questions to all of the panel. All prepared statements, every pristine word, will be made part of the record. Rest assured. Tell your associates not to be worried, because all those good words are going to be in the record.

Without objection, the hearing record will remain open to receive written testimony from persons who have requested their statements to be made part of this printed record.

Our first witness is Tom Usher, the president of the United States Steel Group. U.S. Steel was one of the 12 American companies that recently filed antidumping and countermanding duty petitions against steel imports from 20 countries.

The second witness is Robert F. Bozzone, the chairman and chief executive for Allegheny Ludlum Corp., a producer of specialty steel in Pittsburgh, PA.

The third witness will be Tom Howell, trade attorney with Dewey Ballantine here in Washington and a longtime observer of the steel industry, who has investigated and reported on foreign cartel practices in connection with the recent steel trade petitions.

Our final witness will be Lloyd Constantine who was here at 9 o'clock. We saw him, and he has returned. Lloyd Constantine is a professor of law at Fordham University and former chief of the antitrust section in the New York State Attorney General's Office. In that former capacity, he helped direct the prosecution of several major multistate antitrust actions against predatory international conduct directed at the U.S. market; the exact subject of this hearing.

Gentlemen, I thank you for being with us.

Mr. Usher, you are recognized.

STATEMENT OF THOMAS J. USHER, PRESIDENT, UNITED STATES STEEL GROUP, PITTSBURGH, PA

Mr. USHER. Mr. Chairman, thank you very much for inviting me to appear before the subcommittee this morning.

My name is Thomas Usher. I am president of the U.S. Steel Group, a unit of USX Corp. U.S. Steel is the largest steel producer in this country, and I believe truly representative of a domestic industry that has become a world class player by any measure. Yet, I am here to tell you, as a businessman, that the viability of industrial America, and the American steel industry in particular, is threatened by forces not only beyond our control but apparently beyond the reach of our laws.

The domestic steel industry has undergone a radical transformation over the last 10 years through extensive modernization, productivity gains, cost improvements, and a reduction in capacity.

Since 1980, domestic steelmakers have invested over $23 billion in private funds on modernized equipment and facilities to reduce costs and improve overall product quality and consistency. These improvements came at a high price, not just in investment dollars but in terms of steel jobs permanently lost and entire towns that may never recover.

But today our Nation is a more efficient steel producer than Germany or Japan. Our cost of production per ton is lower than virtually all of our major international competitors, and domestic mills are performing at quality levels as high as any in the world. I would like to be able to tell you that the sacrifice of thousands of steelworkers has led to increased sales and increased profitability, but unfortunately, that is not the case.

Despite the great success of our industry in making quality, cost, and productivity gains over the last 10 years, one key factor has not changed. And that is that foreign producers are still massively distorting the domestic market by importing heavily subsidized by foreign governments and imports that are sold in this country below fair market value.

Over the years, the domestic steel industry has fought aggressively to meet import competition. Indeed, we welcome fair trade and fair competition regardless of its source. The issue is not the presence of imports in our market but the unfair trade practices by which foreign producers have devastated and distorted the most open market in the world.

We would also like to be in a position to tell you that U.S. trade laws will provide us with relief from these unfair trade practices; but our industry has learned the hard way that we cannot rely on

our trade laws to put an end to this practices let alone to make us whole.

In 1992, a coalition of 12 domestic steel producers, together with the United Steelworkers of America, filed petitions with the U.S. International Trade Commission and the U.S. Department of Commerce against imports from a number of countries.

After tens of thousands of pages of briefings and dozens of hearings, the Department of Commerce agreed with us and found unprecedented levels of unfair trade. Yet on July 27, the International Trade Commission cast their votes to deny much of the relief from unfair trade that we had sought.

The Commission incredibly found no injury in 40 of the 72 cases in spite of the fact that the Commission's report showed that the flat rolled steel industry lost $1.7 billion in 1992 alone and despite testimony on the record from producers and customers alike regarding the impact of unfairly traded imports.

Certainly the public recognized the connection between imports and our injury. Within the first 90 minutes after the ITC vote, steel stocks plummeted and the industry lost more than $1 billion in value.

So where does that leave us? With large legal bills, shaky investor confidence, and a small portion of the relief to which we believe we are plainly entitled. And steel works in Pennsylvania, Ohio, and Alabama and across the country are left to wonder how things like this happen in Washington.

Although we have filed appeals to the Court of International Trade, I appear before you this morning because it is clear that unless our trade laws are strengthened and our laws to protect competition are redesigned, the domestic steel industry will not be able to compete on the world stage.

It seems fairly straightforward that our trade laws would be significantly enhanced if those countries aggrieved by unfair and anticompetitive trade practices were provided with an alternative forum in which their grievances could be heard. Our current trade laws require American industry to rely solely upon the Government to address devastating market desertions while the real injured parties, the U.S. companies, are not allowed direct access to the courts to obtain immediate redress.

Moreover, the relief under the trade laws is prospective. Even for the cases we have won, we will never be made whole. Volume lost to unfairly traded imports is lost forever. Duties are paid to the Government and do not redress past injury.

Accordingly, I would urge this subcommittee to support the creation of a viable private remedy for unfair trade practices enforceable in Federal district court.

In this country, production and investment are determined solely by the market; and cartels are illegal as they should be. But for true competition to exist, the entire playing field must be leveled, and that can be achieved by making all the players subject to the same rules. The same rules must be made to apply to foreign countries who seek to do business in the United States.

Anticompetitive practices which are tolerated and even encouraged by foreign governments cannot be permitted to tear the fabric of our free and competitive markets.

We endorse the enhancement and enforcement of U.S. antitrust law so as to reach anticompetitive practices originating overseas including foreign cartels that are exploiting a number of domestic industries.

I would encourage all of you to support any and all legislative efforts that would allow industries that are injured to pursue private remedies not only to redress past injury but to deter just damaging conduct in the future.

I hope that I have been able to share with you some of the frustration that businessmen, steelworkers, and stockholders in the steel industry have felt, not just in the wake of the July decisions but after years of competition with unfairly dumped and subsidized imports.

Thank you.

Mr. BROOKS. Thank you.

[The prepared statement of Mr. Usher follows:]

PREPARED STATEMENT OF THOMAS J. USHER, PRESIDENT, UNITED STATES STEEL GROUP, PITTSBURGH, PA

Thank you for inviting me to appear before the Subcommittee this morning. My name is Thomas J. Usher and I am President of the U.S. Steel Group, a unit of USX Corporation. U.S. Steel is the largest steel producer in this country and, I believe, truly representative of an industry that has accomplished what others only preach: We have transformed what had become a symbol of the decay of industrial America into a world-class player by any measure. Yet, I am here to tell you, as a businessman, that the viability of industrial America—and the American steel industry in particular—is threatened by forces not only beyond our control, but apparently beyond the reach of our laws.

The domestic steel industry has, indeed, undergone a radical transformation over the last ten years through extensive modernization, productivity gains, cost improvements and reductions in capacity. Since 1980, domestic steelmakers have invested over $23 billion in private funds on modernized equipment and facilities to reduce costs and improve overall product quality and consistency. Our labor productivity has nearly doubled, from 9.3 worker hours per ton in 1980 to 4.8 worker hours per ton today.

These improvements came at a high price, not just in investment dollars, but in terms of steel jobs permanently lost and entire towns that may never recover. But we have taken the bitter medicine recommended by so many and, as a result, our nation is now a more efficient steel producer than Germany and Japan. Our cost of production per ton is lower than virtually all of our major international competitors and domestic mills are performing at quality levels as high as any in the world.

If given the time, I would take great pleasure in describing for you the many and varied technological advances in which we have invested, and impress upon you that the U.S. steel industry is truly world-class.

More than anything else, I would like to be in a position to report to this Subcommittee that the domestic steel industry is now reaping the benefits of its sizable improvements and productivity gains. I would like to be able to tell each of you that the sacrifice of thousands of steelworkers in hundreds of communities has led to increased sales and increased profitability. I would like to be able to state that these measures will enable the industry to realize a rate of return sufficient to justify past and future investments. But, unfortunately, this is simply not the case.

Despite the great success of our industry in making quality, cost and productivity gains over the last ten years, one key factor has not changed—and that is that foreign producers are still massively distorting the domestic market. There is no question that America's steelmakers are the low-cost, high quality producers for this market. Yet, imports that have been heavily subsidized by foreign governments, and imports that are sold in this country below fair market value, have negated our ability to achieve profitability. These unfairly traded imports displace a significant volume of domestically produced steel and, at the same time, they work to suppress and depress prices. This financial 1-2 punch is not only devastating to our capital intensive industry, but threatens to knock out many of those companies that have earned their place in the ring.

Over the years, the domestic steel industry has fought aggressively to meet import competition. Indeed, we welcome fair trade and fair competition regardless of its source. The issue is not the presence of imports in our market, but the unfair trade practices by which foreign producers have devastated and distorted the most open market in the world. So, we continue to fight. We have accepted losses rather than give up even more market share to imports, even though we know that we are the low-cost provider of steel to our own marketplace. But it is becoming increasingly clear that we cannot go ten rounds with this strategy. In 1992, the combined flat-rolled industries alone had an operating loss of over $1 billion. We cannot continue to sustain these losses when, at the same time, we must continually invest to remain competitive.

I would also like to be in a position to tell you that the U.S. trade laws will shortly provide us with relief from these unfair trade practices. But our industry has learned the hard way that we cannot rely on our trade laws to put an end to these practices, let alone to make us whole.

As many of you know, in 1992, a Coalition of twelve domestic steel producers, representing over three quarters of all domestic flat-rolled steel production, together with the United Steelworkers of America, filed petitions with the U.S. International Trade Commission and the U.S. Department of Commerce against imports from a number of countries. Despite the enormous cost and burden of these cases, we pressed for enforcement of the trade laws not merely because, as a matter of principle, we believed it was time to call halt to the years of subsidization and dumping in which these countries have engaged, but because competition with unfairly traded imports was causing such substantial injury to the domestic industry that it threatened the very existence of domestic steel companies and American jobs.

After tens of thousands of pages of briefings and dozens of hearings, at great expense to the Coalition members and to the taxpayers of this country, we were vindicated when the Department of Commerce agreed with us and found unprecedented levels of unfair trade. In fact, the Commerce Department determined that the average ton of steel subject to that investigation was subsidized or sold below value by approximately 37%. To use an example, this means that foreign steel worth approximately $600 per ton was being sold here for less than $450 per ton. In some cases, the Department even found margins reaching as high as 80 or 90 or 100%.

The Commerce Department officially found what we knew to be the case all along. If we ever wondered how it could be that foreign steel, shipped hundreds of miles across the water, from less efficient producers, could be sold so cheaply in the U.S. market, the Department of Commerce answered this question quite plainly: By massive infusions of government subsidies and pervasive dumping practices.

We were vindicated and we were encouraged and the only step remaining before remedial duties would be finally assessed, was for the International Trade Commission to conclude its investigation and vote on whether this unfair trade injured the U.S. industry. The entire domestic industry fully expected the ITC to find the injury that we knew existed, and we expected that, prospectively at least, we would finally be able to compete with imports from these countries on a "level playing field."

Yet, on July 27, the International Trade Commission cast their votes to deny much of the relief from unfair trade that we had sought. The Commission incredibly found no injury in 40 of 72 cases, despite the fact that the Commission's own staff report showed that the flat-rolled industry lost $1.7 billion in 1992 alone; despite extensive testimony on the record from domestic steel producers that they were losing business to unfairly traded imports; and, despite extensive testimony from our customers that unfairly traded imports drive down domestic prices.

Apparently, the only people unwilling to acknowledge the impact of these unfairly traded imports on the domestic industry were four ITC Commissioners. Certainly the public recognized the connection between imports and our injury, because when it became clear that U.S. laws were not going to be used to halt this unfair trade, steel stocks plunged. Within the first ninety minutes after the ITC vote, steel stocks plummeted and the industry lost more than $1 billion in value.

It is not hard to understand why the financial markets were shocked, and why the foreign producers rejoiced, at the ITC vote: A majority of the Commissioners (4 out of 6) had found that billions of dollars worth of unfair trade was having no negative effect on U.S. steel makers. The ruling was even more surprising because the legal standard involved provides for an extremely low threshold for an injury finding. To prevail, the domestic industry must only show "harm that is not inconsequential, immaterial, or unimportant" and that imports are a cause, "even minimally," of that harm. In other words, under the law as written, any harm that has any negative consequence to the domestic industry, and is caused to any degree by imports, is actionable.

Yet, examples of what the Commissioners found to have no effect are astonishing: The majority of the Commission held that a quarter of a billion dollars of one Japanese steel product, dumped at 36% less than fair market value, had no effect on the domestic companies; $140 million of a French product with a dumping rate up to 95% meant nothing; Brazilian steel with a combined dumping and subsidy rate of 132% was unimportant; and over $300 million worth of Canadian steel dumped at 20% of fair market value, could be ignored. Apparently, the statute, as written, could be ignored.

So where does that leave us? With large legal bills, with shaken investor confidence, and with only a small portion of the relief to which we believe we are plainly entitled under the laws of this country. We are also left wondering whether key Commissioners were influenced by the statements of foreign governments about world-trade talks, or whether the ITC Commissioners were trying to change the law, or engage in foreign policy. What we do know, though, is that appeals have been filed with the U.S. Court of International Trade, relief will be delayed, and the steelworkers in Pennsylvania, Ohio, Alabama, and across this country will be left to wonder how things like this happen in Washington.

Back in 1967, the Senate Committee on Finance released a study on the problems confronting the domestic steel industry as a result of an expansion in steel imports. The Committee concluded that unless something was done to attack the problems of subsidization, dumping, regional and preferential trading blocs, and cartel-like arrangements, steel imports were likely to increase to such a high level that certain products would become unprofitable for the domestic steel industry to produce.

This sounds frighteningly familiar. That was the conclusion in 1967, and here we are, over 25 years later, with Commerce Department margins of dumping and subsidization so enormous that they tower over anything found in earlier cases, and we still cannot get the relief to which we are entitled under the law. And we continue to lose money and good American jobs.

Little has changed since the Senate conducted that study in 1967. There is still an urgent need for fairer rules in International Trade. But we appear to be going backwards; our trade laws are being put up for grabs in international negotiations abroad and, at home, they are being rewritten, not by the Congress, but by those charged to enforce them. Clearly, there is far greater urgency today that we combat anticompetitive practices if this country—and its industries—are to remain competitive in our market and in the world market.

Unless our trade laws are strengthened and our laws to protect competition are redesigned, the domestic steel industry will not be able to compete on the world stage. We must ensure that our trade laws are not tampered with solely to conclude a multi-lateral trade agreement. For example, many of the proposed revisions to the dumping and subsidy codes now being circulated in the GATT negotiations would, if adopted, perpetuate forever the current anticompetitive practices so damaging to our economy. Proposals that would leave our trade laws vulnerable to attack by GATT Panels, rather than reviewed and enforced by U.S. courts, would significantly weaken any efforts to police our own markets.

In addition, and it seems fairly straightforward, our trade laws would be significantly enhanced if those companies aggrieved by unfair and anticompetitive trading practices were provided with an alternative forum in which their grievances could be heard. Our current trade laws require American industry to rely solely upon government agencies to address devastating market distortions while the real injured parties—U. S. companies—are not allowed direct access to the courts to obtain immediate redress. Accordingly, I would urge this Subcommittee to support the creation of a viable private remedy for unfair trade and anticompetitive practices, enforceable in federal district court.

Currently, when relief is granted under the trade laws, it is prospective only. Even for the cases we have won, we will never be made whole. Volume lost to unfairly traded imports is lost forever, and prices suppressed or depressed by unfairly traded imports represent revenues lost forever. Duties are paid to the government, and do not repay the industry for the expense of pursuing fair trade under U. S. law. Accordingly, we support legislative efforts which would amend the Antidumping Act of 1916 so as to provide for an enforceable private right of action.

The 1916 Act is an antitrust law that currently makes it unlawful for importers to systematically import or sell goods dumped at substantially less than home market value, if it can be proven that such acts were done with an intent to injure an industry in the United States. The statute also provides a private right of action to parties injured by violations of that section, and allows for treble damages and attorney's fees for successful suits. But the 1916 Act, which has been the law for close to 80 years, has never been successfully invoked because the proof required is extremely difficult to obtain and the legal standard is virtually impossible to

meet. Legislation which would provide for a civil remedy without the criminal intent requirement and the criminal law burden of proof would provide a far more practical avenue for petitioning parties to seek damages for past injuries.

Unless workable mechanisms to address damaging anticompetitive practices are enacted, our markets will continue to prop up foreign producers unwilling to adjust to world overcapacity. In this country, production and investment are determined solely by the market and cartels are illegal, as they should be. But, for true competition to exist, the whole playing field must be level and that can be achieved only by making all of the players subject to the same rules. Our markets are among the most competitive in the world, largely because our laws proscribe conduct which is injurious to, or inconsistent with, open competition. The same rules must be made to apply to foreign companies who seek to do business in the United States. Anticompetitive practices, which are tolerated—and even encouraged—by foreign governments cannot be permitted to tear the very fabric of our free and competitive markets. Accordingly, we endorse the vigorous enforcement and enhancement of United States antitrust law so as to effectively reach anticompetitive practices originating overseas, including foreign cartels, that are exploiting a number of domestic industries.

I would encourage all of you to support any and all legislative efforts that will allow the steel industry, and other domestic industries that are similarly injured by these anticompetitive foreign practices, to pursue private remedies, not only to redress past injury, but to deter such injurious conduct in the future.

I hope that I have been able to share with you some of the frustration that businessmen, steelworkers, and stockholders in the steel industry have felt, not just in the wake of the July decisions, but after years of competition with unfairly dumped and subsidized imports. Thank you.

Mr. BROOKS. Mr. Bozzone.

STATEMENT OF ROBERT P. BOZZONE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, ALLEGHENY LUDLUM CORP., PITTSBURGH, PA, ON BEHALF OF THE SPECIALTY STEEL INDUSTRY OF THE UNITED STATES

Mr. BOZZONE. I am Robert Bozzone, and I am president and chief executive officer of Allegheny Ludlum Corp., a U.S. specialty steel company. I also serve on the Executive Committee of the Specialty Steel Industry of the United States, a trade association representing 21 domestic producers of specialty steel. I appreciate the opportunity to testify before you today on international competition in the specialty steel sector.

Despite the specialty steel industry's technological superiority and high productivity, we have suffered injury from excessive imports. I believe a brief review of the relief provided to our industry will help you assess the competitive conditions in this sector.

Between 1958 and 1968, steel imports into the United States increased by more than tenfold as a result of the same conditions faced by the specialty steel industry today: excess foreign capacity, foreign government subsidies, unfairly priced product, and lower labor costs.

The Johnson administration's solution to the domestic steel industry's problem was to institute a voluntary quota program with Japanese and European steel associations for the years 1969 to 1974.

After that program expired, the imports of specialty steels substantially increased causing the industry to layoff 25 percent of its work force.

Given these conditions, U.S. producers filed a section 201 petition with the International Trade Commission, which led to the imposition of quantitative restraints for a 3½-year period.

Upon removal, the specialty steel imports increased almost 30 percent. The industry again turned to the trade laws for relief winning numerous antidumping and countervailing duty cases between 1982 and 1984.

In addition, the industry also filed a 301 petition in January 1, 1982, against European subsidies. This petition ultimately led President Reagan to implement 4 years of higher tariffs and quotas on specialty steel imports.

During this timeframe there were also other developments. In 1983, the carbon steel industry sought relief under the escape clause, which led the Reagan administration to negotiate voluntary restraint agreements with 19 countries in the European Community.

Although initially designed to limit imports of carbon steel, it eventually incorporated a number of specialty steel products.

As expected, the removal of the restraint program on March 31, 1992, saw imports of high-value, specialty steels soar.

To prevent further harm to our industry, we filed three antidumping cases in 1992, and another three dumping cases and one countervailing duty case thus far in 1993, bringing the grand total of trade cases since 1973 to 15 dumping cases, 5 countervailing duty cases, 2 escape clause cases, 1 escape clause extension request, and 2 section 301 cases.

Thus, the trade laws of the United States have proven essential to this industry to respond to unfair international competition in the United States.

Unfortunately, the industry has not only experienced unfair trade practices in its home market. It is also prevented from freely exporting its steel to foreign markets. As you know, Japan limits imports of products that it manufactures there. European producers have been equally effective in restraining foreign competition by fixing prices of stainless steel at levels that U.S. producers would not match.

Foreign governments have also employed a variety of techniques to inhibit import competition, such as restrictive import licensing and high tariffs.

While we have been quite successful in winning our cases, U.S. trade laws have provided us with only limited relief. The available statutory remedies are entirely prospective providing little deterrence to this unlawful conduct.

Perhaps most importantly, U.S. industries that have suffered injury from subsidized or dumped goods are not compensated for their loss; for these reasons, we have supported Senator Specter's legislation that allows a private cause of action for injury from unfair trade practices in violations of customs law.

We also have lent support to Senator Metzenbaum's efforts to amend the U.S. antitrust laws to provide a remedy for companies injured by unfair competition for imports.

Mr. Chairman and members of the subcommittee, while our trade laws remain imperfect, there is no question that any weakening of their effectiveness, either through the multilateral steel arrangements or GATT, will lead to an increase in unfairly traded imports and a consequent decrease in manufacturing capability within the United States.

Thank you again for this opportunity to discuss competitive conditions in the U.S. specialty steel market.

Mr. BROOKS. Thank you very much.

[The prepared statement of Mr. Bozzone follows:]

PREPARED STATEMENT OF ROBERT P. BOZZONE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, ALLEGHENY LUDLUM CORP., PITTSBURGH, PA, ON BEHALF OF THE SPECIALITY STEEL INDUSTRY OF THE UNITED STATES

Mr. Chairman and Members of the Subcommittee:

My name is Robert P. Bozzone and I am president and chief executive officer of Allegheny Ludlum Corporation, a U.S. specialty steel company. I also serve on the Executive Committee of the Specialty Steel Industry of the United States, a trade association representing 21 domestic producers of specialty steel. I appreciate the opportunity to testify before you today on international competition in the steel sector.

I. DESCRIPTION OF THE SPECIALTY STEEL INDUSTRY

At the outset, I would like to describe our segment of the steel industry. Specialty steels include stainless steels, tool steels, heat-resisting steels, electrical steels, super alloys and other high technology materials. This type of steel, which is often produced in small quantities in accordance with customer specifications, comprises approximately two percent of the volume of steel shipments, but more than 10 percent of the value of such shipments.

Our high-technology products possess unique characteristics that permit their use in extreme environments demanding exceptional hardness, toughness, strength and resistance to heat, corrosion or abrasion. Specialty steels are essential for many applications in both the capital goods and consumer durable sectors of the economy. Our products are also essential to the production of virtually every major weapon system, as well as aircraft and other defense-related equipment. In many critical uses, there are no feasible substitute materials.

The one constant among U.S. producers of specialty steel is the commitment to modern technology, innovation and productivity. Such a commitment is reflected in the continuous capital investment in our production facilities and the ongoing effort to bring new materials to the marketplace. Neither recessionary economic conditions nor the questionable practices of our overseas competitors has undermined the industry's commitment to maintaining its competitiveness and technological leadership on a global basis.

II. HISTORY OF THE INDUSTRY'S STRUGGLE AGAINST UNFAIR TRADE PRACTICES

Despite the industry's technological superiority and high productivity, we have suffered injury from excessive imports. It is therefore instructive to focus on our 20-year battle against unfair trade practices to assess the strengths, as well as the limitations, of U.S. trade laws.

A. 1969-1974: Voluntary Quota Programs

Between 1958 and 1968, steel imports into the United States increased by more than tenfold as a result of the same conditions faced by the specialty steel industry today—excess foreign capacity, foreign government subsidies, unfairly priced product, and lower labor costs.

The Johnson Administration's solution to the domestic steel industry's problems was to seek "voluntary" quota programs with foreign producer associations. Both Japanese and European steel producers agreed to limit steel shipments to the United States to specified maximum tonnages for each year between 1969 and 1971. These "voluntary" quotas were subsequently extended from 1972-1974 in response to requests from the domestic industry and Congress.

The first voluntary restraints did not distinguish between ordinary carbon steel and specialty steel. This encouraged foreign producers to change their product mix from mostly carbon steel to an increasing proportion of specialty steel. At that time, carbon steels were selling in the $120-$200 range. By comparison, stainless steel was selling for more than $1,000 per ton and certain tool steels were selling for more than $7,000 per ton. By increasing their exports of specialty and alloy steel products, Japanese and European producers increased the dollar value of their exports during the restraint period, even though they reduced or maintained their overall export volumes.

B. 1975-1984: Import Quotas, Tariffs, and Antidumping and Countervailing Duties

In 1975, the year after the first steel voluntary restraint program expired, imports of specialty steel increased 20 percent while American consumption decreased by 40 percent. The specialty steel industry laid off 25 percent of its work force and was utilizing only one-half of its productive capacity. Given these conditions, U.S. specialty steel producers and the United Steel Workers of America filed a Section 201 petition seeking relief from the flood of steel imports that threatened the future of the domestic specialty steel industry and the security of American jobs.

The ITC determined that specialty steel imports were a "substantial cause of serious injury" to the domestic industry. In response to this finding, President Ford set three-year quotas for imports of certain specialty steels from Sweden, Canada, France, Great Britain, Austria, and West Germany. The United States simultaneously negotiated an orderly marketing agreement with Japan. The import quotas were scheduled to expire in July 1979, but were extended by President Carter through February 13, 1980.

In the first five months of 1980, following removal of the quotas, specialty steel imports increased by 29 percent. The pattern resumed: when restraints were removed, imports surged. The industry again turned to the trade laws, unleashing an aggressive attack on unfairly traded imports of specialty steel. During the period 1982-1984, the Specialty Steel Industry of the United States and the United Steel Workers of America filed and won numerous antidumping and countervailing duty cases against specialty steel producers around the world.

In addition to seeking remedies under the antidumping and countervailing duty laws, the industry also filed a Section 301 petition with the United States Trade Representative in January 1982. The 301 petition alleged that several EC countries, including Austria, France, Italy, Sweden, the United Kingdom and Belgium, were subsidizing specialty steel products in violation of the GATT. In November 1982, President Reagan, after confirming the industry's allegations of subsidization, directed the International Trade Commission to initiate a Section 201 investigation—like the one we filed in 1975—with respect to stainless plate, rod, bar, sheet and strip, and alloy tool steel.

The ITC completed the requested investigation in May 1983, finding once again that the specialty steel industry had suffered serious injury, and that the most important factor in causing that injury was the dramatic growth in imports during the 1980-1983 period. President Reagan instituted an import relief program for specialty steel in July 1983, which included four years of higher tariffs on stainless steel flat-rolled products and four years of import quotas on stainless steel bar and wire rod, and alloy tool steel.

C. 1984-1992: Voluntary Restraint Agreements

Of course, there were other developments. In 1983, Bethlehem Steel Corporation and the U.S. steelworkers filed a Section 201 case on carbon steel products. While the case resulted in an affirmative injury determination, President Reagan chose not to provide—as he had in the case of specialty steel—specific import relief. Instead, on September 18, 1984, the Administration established a national policy for the steel industry that included the negotiation of voluntary restraint agreements with 19 countries and the European Community. The VRA program was initially designed to limit imports of carbon steel into the United States. It eventually incorporated a number of specialty steel products, which had previously been covered by the "escape clause" relief program.

Although the VRAs were scheduled to expire in 1989, President Bush announced the Steel Trade Liberalization Program, under which the restraints were extended for 2½ years. Thankfully, the specialty steel industry's proven vulnerability to product-shifting convinced the President that the effectiveness of the VRA extension would be undermined if any specialty steel products were excluded.

D. 1992 to Date: Antidumping and Subsidy Cases

The VRA program provided our industry with an opportunity to maintain its worldwide technological position through investment in research and development; construction of modern facilities; and improved productivity. However, additions to worldwide capacity by foreign specialty steel producers were expected to exceed three million tons by the time the VRAs expired—an amount exceeding total U.S. annual consumption of specialty steel. Indeed, much of that new capacity was scheduled to come on stream concurrent with the termination of the VRA program.

Alarmed by these developments and the failure of U.S. government negotiators to conclude a Multilateral Steel Arrangement, we asked the Administration for a further extension of the VRA program. Unlike other segments of the steel industry, vir-

tually every VRA category covering a specialty steel product had been filled or exceeded. We warned that under these conditions, removal of the VRAs would unleash an unprecedented import assault on our market.

As expected, removal of the restraint program on March 31, 1992 saw imports of high-value specialty steel soar. The growth in import tonnage ranged from 27 percent in the stainless flat-rolled industry, which comprises more than 60 percent of total industry shipments, to approximately 60 percent in the stainless steel wire rod segment. While import competition of this nature has been the norm rather than the exception for our industry, the level and speed of the import growth was unprecedented in a number of product categories and confirmed our worst fears that foreign steel producers, with their governments standing behind them, are targeting the specialty segment of the U.S. steel market.

To prevent further harm to our industry, we filed three dumping cases in 1992, and another three dumping cases and one countervailing duty case thus far in 1993—bringing the grand total of trade cases since 1973 to 15 dumping cases; five countervailing duty cases; two "escape clause" cases; one "escape clause" extension request; and two section 301 cases. Thus, the trade laws of the United States have proven essential to the industry's response to international competition in the steel sector.

E. Unfair Trade Practices Affecting Industry Exports

Unfortunately, the industry has not only experienced unfair trade practices in its home market, it has also been prevented from freely exporting its steel to foreign markets. As you know, Japan effectively limits imports of products that it manufactures there, thus restricting U.S. exports of specialty steel to Japanese customers. European producers have been equally effective in restraining competition from U.S. companies by fixing the prices of stainless steel at levels that American producers could not match.

Foreign governments have also employed a variety of techniques to shield their domestic industries from import competition. For example, Brazil imposed a restrictive import licensing system and high tariffs to prevent access to its specialty steel market. Brazilian authorities would not issue licenses for materials such as specialty steel which were already produced in that country. Even if a license could be obtained, the 50 percent import duty and the additional 25 percent tariff on financial operations would have proven insurmountable obstacles to U.S. exports.

South Korea took advantage of tariff rate quotas and import licensing regulations to prevent the sale of American specialty steel in their market. In fact, Korea's licensing procedures often amounted to a *de facto ban* on many specialty steel items. For stainless steel wire and wire rod, importation was only allowed if the government received an affirmative recommendation from the Korean Iron and Steel Association. The French government has also told us to "stay out," warning that U.S. products were unwelcome in certain sections of their economy.

Thus, different types of measures have been used to limit, or completely eliminate, international competition within foreign steel markets.

III. PRIVATE RIGHT OF ACTION

While we have been quite successful in winning our cases, U.S. trade laws have only provided us with limited relief. The statutory remedies available under the "escape clause" and the countervailing duty and antidumping laws are entirely prospective. No matter how long foreign producers have engaged in unfair trade practices and no matter how much injury they have caused, countervailing and dumping duties and quantitative restraints are only applied against imports entering the U.S. market after the government makes affirmative determinations in these cases. Foreign producers are therefore free to engage in these practices until they are caught. Such prospective relief provides little deterrence to this unlawful conduct. But perhaps most importantly, U.S. industries that have suffered injury from subsidized or dumped goods are not compensated for their loss. Unlike other areas of domestic law where legal redress makes the victim "whole," no such relief is provided to U.S. companies suffering injury from prohibited commercial practices involving imports.

For these reasons, we have pressed for enactment of legislation that would allow a cause of action for persons injured in U.S. commerce by unfair trade practices and violations of customs laws. A private right of action on these grounds would give American companies access to the courts for redress from dumped, subsidized and fraudulently entered goods. The specialty steel industry has therefore been most appreciative of Senator Specter's repeated introduction of legislation that would allow U.S. companies to obtain damages for such injury. We have also lent support to Sen-

ator Metzenbaum's efforts to amend U.S. antitrust laws to provide a remedy for companies injured by unfair competition from imports.

IV. CONCLUSION

As an example of the devastation our industry has suffered, you should know that the Specialty Steel Industry of the United States included 11 companies producing stainless steel sheet and strip in 1980. Today, only four remain. If efficient, technologically advanced corporations with skilled work forces, who have demonstrated their ability to compete on the basis of product offerings and quality, cannot succeed even when they are fully competitive, why should American capital continue to be invested in such companies? Whether our industry elects to continue the high level of capital investment necessary to remain competitive is an issue that will turn in large measure on how the United States government chooses to deal with unfair import competition in the coming years. Clearly, a private right of action which would compensate victims for past harm would improve our industry's ability to protect itself against—and recover from—unfair trade practices.

Moreover, while our trade laws remain imperfect, there is no question that any weakening of their effectiveness will lead to an increase in unfairly traded imports and a consequent decrease in U.S. manufacturing capability and employment. Thus, although we support the continuing effort to find a multilateral solution to the problem of foreign government subsidization, we are skeptical at best of any international agreement that will grandfather past subsidy programs or provide waivers so broad that the fundamental purpose of the agreement will be undermined. We are also deeply concerned about the attempt by foreign producers to utilize the MSA process and the GATT negotiations to diminish the effectiveness of U.S. trade laws. The trade laws, and the remedies that have flowed from their enforcement, have been the most important lines of defense against the unfair trade practices that have plagued our domestic markets.

In conclusion, our industry faces a real threat. But, we are also an industry that has done everything we can to meet that threat. We are a competitive, technologically-advanced manufacturing industry that has developed a highly-skilled, well-paid work force—the type of work force that has been central to the economic aspirations of the current and previous Administrations.

I would therefore like to thank you for this opportunity to discuss competitive conditions in the U.S. specialty steel market and the effect that the unfair trade practices of our foreign competitors has had on this efficient and innovative American industry.

Mr. BROOKS. Mr. Howell, Counselor.

STATEMENT OF THOMAS R. HOWELL, DEWEY BALLANTINE, WASHINGTON, DC

Mr. HOWELL. Thank you, Mr. Chairman and members of the subcommittee. My name is Tom Howell. I am a partner in the Washington law office of Dewey Ballantine. I have represented American companies in matters involving international competition for 15 years, and I appreciate the opportunity to appear before you today.

I am here today to talk about foreign cartels and steel. Now, by the term "cartel," which is used somewhat loosely, I mean agreements between competitors not to compete in ways that would probably be regarded as illegal per se under antitrust laws—price fixing, market division, and allocation agreements to limit production and deliveries to set levels to keep prices high.

What I am about to tell you I believe to be true, but I begin with a caveat that it is based on information provided by others. I have not sat in on cartel sessions myself, but we did interview many knowledgeable sources, including people who have taken part in those meetings. We gathered a lot of documentary evidence, including a large number of what we believe are cartel documents.

I believe that most objective observers on reviewing this mass of evidence would be convinced that what I am about to describe is true.

I might note that this is the second opportunity that the foreign mills have had to meet these allegations head on, on the record. The first was the ITC hearing in June. And, again, they have chosen not to do so. Their response has been silence.

This issue has risen in the context of the trade litigation that Mr. Usher has already mentioned, antidumping and countervailing duty cases that we brought against 19 countries on behalf of U.S. producers of flat rolled steel.

The U.S. steel industry has been aware of the existence of foreign cartels of steel for some time. The European Communities operated a government-administered cartel between 1978 and 1987 often referred to as the Davignon Plan. Some elements of this plan have been reintroduced by the Commission this year. That was an open matter.

The five Japanese integrated mills have operated a similar system for decades under which they jointly limit production pursuant to guideposts issued by the Ministry of International Trade and Industry designed to keep prices high and maintain stable market shares. They don't draw attention to this system, but it is an open secret in Japan.

So when the litigation began, we knew that cartels were part of the problem that our industry faced because they foster dumping. At the beginning of the cases, we asked the ITC to use its investigatory powers to develop more information about the cartels. For whatever reason, they chose not to do that.

Then, toward the end of the trade cases, and quite unexpectedly, we began to receive new information about the sheer extent of the cartelization of international steel trade that went beyond anything that we previously had been aware of. We investigated. And what emerged was the following story: First, it is our understanding that the 12 main producers of flat rolled steel in the European Community regulate competition between each other in export markets in an organization called the London Committee. This group reportedly establishes target prices for some export markets, sets agreed tonnages for those markets, and arranges the transfer of export business among the members of the club.

Second, we believe that the same EC mills that comprise the London Committee are parties to an arrangement with the five Japanese integrated mills and POSCO of South Korea, known as the London Agreement or the East of Burma Agreement.

Under this agreement, the Eastern Hemisphere is divided into spheres of influence between the EC, Japan, and Korea, with Burma serving as the boundary line. The EC mills are severely limited in their ability to export steel east of Burma, and the Japanese mills and POSCO are constrained in sales to the EC and what is called the EC semihome market, that is the EFTA countries and Eastern Europe. Annual quotas are set by product, by country, by producer, for exports in each direction; and price floors are set for markets.

I have attached to my testimony attachment 2 here, a document which was given to us by trading companies in Japan. They say this is a document that was given to them by European traders showing the quotas set under the East of Burma Agreement for 1993.

What you see here is that European companies, by product, listed down in the left margin; and the right margin you the see the quotas set by the European mills for sales into the Japanese markets.

The Japanese traders were told by European steel firms that they tried to buy steel from them, but they couldn't sell them any more than what was provided for on this sheet because the quotas had been set under the East of Burma Agreement.

There is a similar chart for the Korean market, also for 1993.

We checked these documents out independently, by the way, in Europe; and we were told by sources in Europe as well that they were genuine. The East of Burma Agreement is the subject of quarterly meetings between the Europeans, Japanese, and Koreans where tonnages and prices are set and complaints about violations are addressed. The most recent meeting about which we have been able to learn in detail was in Marbella, Spain, in March of this year.

Third, the Japanese mills led by Nippon Steel have negotiated a series of mill-to-mill agreements with mills in the eight major steel producing countries to regulate the price and volume of steel moving in both directions in each of these countries and Japan.

The Japanese agreed to limit the volume of exports to each country, and they avoid price reductions below a specified level; and, in return, those countries give a similar pledge with respect to the Japanese market.

When you put all of this together, one sees a web of secret agreements that regulates much of the flat rolled steel that is traded in the world. And we have attached a diagram to my testimony laying this out.

Why does it matter? There is a close nexus between cartels and dumping. National and regional cartels, like we see in the Japan and the EC, function, essentially, by creating internal shortages for steel. That is how they keep their prices up. It also means that the surpluses have to be disposed of externally, and they are. They are dumped onto the world market.

Second, the international cartels like the East of Burma Agreement, which is essentially a bilateral arrangement, if you will, between two regional cartels, EC and Japan, channel these dumped surpluses by cutting down on the number of export markets where they can go. They are diverted into markets where access is unrestricted. And that is what is happening to us. You see in flat rolled products that the Japanese don't export really anything to Europe and the Europeans export almost nothing to Japan. But both the Japanese and the Europeans export massive tonnages to our market. You see the same phenomenon vis-a-vis Japan and Canada and Korea and the EC.

What are the policy implications? I would summarize what some of them are.

First all, obviously, our companies are prohibited by the antitrust laws from forming cartels. That is fine. That reflects a national consensus that cartels don't belong in our country. But in steel and many other industries, our companies are competing against firms that are not constrained in the same way. And the question is whether our legal remedies and the trade policies that we have

adequately take this difference into account. I think the steel case shows eloquently that this is not the case.

I have set forth four reasons why I think we have a problem here. There is an information problem. Our Government didn't know about the East of Burma Agreement as far as I know. It had to be developed by the private sector—by us. And we don't have the tools the Government has. We have no subpoena power or anything else. We have had to do this on our own.

There is a second problem, a thinking problem. There is a sense that if the foreigners want to form a cartel, that is fine, we should go ahead and let them, because they are only hurting themselves. I think what is happening with steel shows that that is wrong.

Third, we have an institutional problem. We have a trade policy apparatus that concerns itself with foreign government actions that hurt U.S. producers and an antitrust apparatus that looks at private conduct mainly with respect to its impact on consumers. Here we have anticompetitive private foreign actions that hurt U.S. producers, and the only weapon we have against that is the antidumping laws. That is, as has been proven, an important tool, but not a cure-all, as we found; and those laws are under attack in the Uruguay Round.

The final problem is an international one. We can't really develop a consensus with our trading partners because we don't see eye to eye on the basic question of industrial organization, whether or not cartels should be allowed.

What is the answer? I don't know. I think right now we are at a stage of grappling with a problem that we don't have the tools to deal with effectively. I think it is important that we develop the facts about the cartels, and that is why I think hearings like this one are important. I believe this is a big problem, and I appreciate the opportunity that you have given me here today to set forth what I believe to be the facts.

Thank you.

Mr. BROOKS. Thank you. Thank you very much.

[The prepared statement of Mr. Howell follows:]

PREPARED STATEMENT OF THOMAS R. HOWELL, DEWEY BALLANTINE, WASHINGTON, DC

Mr. Chairman and Members of the Subcommittee, my name is Thomas R. Howell. I am a partner in the Washington law office of Dewey Ballantine, where I specialize in international trade matters. I have served as counsel to American companies, industries and workers in matters involving international competition for over fifteen years. The U.S. industries on whose behalf I have worked include high technology sectors like semiconductors and telecommunications equipment as well as traditional industries like steel, textiles and chemicals. While I am here today to talk about steel, the issues that I am addressing are relevant to other industries as well.

I am here today to talk about foreign cartels in steel, which is an important part of the broader problem of trade distortion in the steel industry. The term "cartel" is sometimes used rather loosely, but I am referring to agreements between competitors not to compete in ways that would probably be regarded as illegal per se under our antitrust laws—price fixing, division of markets, and agreements to limit production and deliveries to agreed levels in order to keep prices high.

What I am about to tell you I believe to be true, but I begin with the caveat that it is based on information provided by others. I have not sat in on or witnessed cartel sessions myself. I have talked to a number of people who say that they have taken part in such activities, and I am convinced they are telling the truth. We have interviewed a number of other people with inside knowledge of foreign steel activities who tell essentially the same story. We have also gathered a considerable

amount of documentary evidence and secondary sources which tend to corroborate the existence of such activities. I believe that most objective observers, upon reviewing this mass of evidence, would be convinced that what I am about to describe is true in its essential elements.

The cartel issue has arisen in the context of trade litigation in which our law firm and co-counsel Skadden, Arps are engaged or behalf of the U.S. producers of flat-rolled steel.[1] The U.S. industry is currently seeking relief from dumped and subsidized imports under the antidumping and countervailing duty laws. The litigation reflects the fact that there have been massive distortions of trade in this industry for many years—in addition to cartels, foreign steel producers have received well over $100 billion in government subsidies since 1980, and dumping has been extensive and severe. The financial and human toll on the U.S. steel industry has been extremely heavy.

The U.S. steel industry has been aware of the existence of foreign cartels in steel for some time. The European Community operated a government-administered cartel in steel between 1978 and 1987—often referred to as the Davignon Plan—and some elements of this plan, such as establishment of joint production limits to raise prices have been reintroduced by the Commission this year. This type of cartel is openly disclosed, with the Commission's actions published in the *Official Journal* and reported in the press.[2] The five Japanese integrated mills have operated a similar system for decades, under which they jointly limit production pursuant to "guideposts" issued by the Ministry of International Trade and Industry to keep prices high and maintain stable market shares.[3] They don't exactly draw attention to this system, but it is an "open secret," the subject of occasional comment in the Japanese press. Similarly, for over twenty years a so-called "gentleman's agreement" between the European and Japanese mills to stay out of each other's markets has been the subject of occasional notice in the press, and was the subject of two Section 301 actions by the American Iron and Steel Institute in 1978 and 1982.[4] The status of this arrangement was murky at the time we filed our cases in mid-1992.

When the litigation began last year, we knew that cartels were a big part of the problem that our industry faced, because they foster dumping. At the beginning of the trade cases we asked the International Trade Commission to use its investigatory powers to develop more information about the cartels.[5] For whatever reason it did not choose to do so. Then, toward the end of the trade cases, and quite unexpectedly, we began to receive new information about the sheer extent the cartelization of international steel trade which went considerably beyond anything of which we had previously been aware.

In April 1993 the American Iron and Steel Institute received a letter from Japanese steel trader who had been following the trade cases and had read reports about the U.S. steel industry's allegations of cartel activity in Japan and EC. He not only concurred with these allegations, but proceeded to lay out details of a web of international anticompetitive arrangements that was much more extensive and complex than anything we had known about. We checked him out and learned that he had a very solid reputation in his business. Robert Lighthizer of Skadden, Arps and I contacted him and ultimately visited him in Japan, as well as a number of other executives from Japanese trading companies that import steel. We simultaneously began inquiries in Europe and elsewhere in an attempt to verify and flesh out the information we were getting in Japan. This work is still under way.

As a result of these efforts, we have gathered a substantial amount of information about the operation of international steel cartels from the late 1970s through 1993, and we submitted this information to the ITC as evidence of the threat of material

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[1] The petitioners are Armco Steel Co., L.P.; Bethlehem Steel Corp.; Geneva Steel; Gulf States Steel, Inc. of Alabama; Inland Steel Industries, Inc.; Laclede Steel Co.; LTV Steel Co., Inc.; Lukens Steel Co.; National Steel Corp.; Sharon Steel Corp.; USX Corp./U.S. Steel Group; and WCI Steel, Inc.

[2] The Commission orders establishing production limits ("forecasts") for the purpose of "market stabilization" for the second quarter of 1993 are reproduced in Attachment 15.

[3] See Attachments 5, 10 and 13.

[4] See Attachment 7, 8, and 9.

[5] "Petitioners hope ... that the International Trade Commission seeks further information in its questionnaires and appropriate certifications by respondents on the subject of ... current anticompetitive practices in the EC steel market.... Petitioners ask that all respondents be directed [by the Commission] to certify that they are not engaged in any anticompetitive practices designed to regulate production, delivery and/or prices of the steel products at issue in these cases, or, if they are involved in such activity, that they describe them on the record of this investigation." Letter from Thomas R. Howell and Michael H. Stein, Counsel for Petitioners, to Mr. Paul Bardos, Acting Secretary, International Trade Commission, July 30, 1992.

injury faced by the U.S. industry. I will be the first to admit that this information is fragmentary and that some of it probably would not be admissible as evidence in a court of law—it consists, for example, of letters, faxes, and reports from our overseas sources, as well as a considerable collection of what we are virtually certain are internal cartel documents from the period 1978 through 1993, a few of which I am attaching to my testimony.[6] While we haven't had enough time to pursue all leads and develop the information base fully, I can say that we now have multiple sources—backed up in some cases by documents and independent press accounts—that all tell essentially the same story. That story is as follows:

First, it is our understanding that the twelve main producers of flat-rolled steel in the European Community informally regulate competition between each other in export markets in an organization known as the London Committee or London Club. The London Committee consists of executives from each firm who meet on a monthly basis in hotels in European cities. This group reportedly establishes target prices for some export markets, sets agreed tonnages for those markets, and facilitates the transfer of export business among the members of the Club. This activity should not be confused with the internal cartel administered by the EC Commission whose objective is price stabilization, which has the sanction of the Commission, and whose actions are more or less public. The London Committee is a secret organization, although public references to it do occasionally crop up.[7]

Second, we believe that the same EC mills that comprise the London Committee are parties to a longstanding arrangement with the five Japanese integrated mills and POSCO of South Korea known as the London Agreement or the East of Burma Agreement.[8] Under this Agreement the Eastern Hemisphere is divided into spheres of influence between the EC and Japan/Korea, with Burma (Myanmar) marking the line of demarcation between the spheres. The EC mills are severely limited in their ability to export steel east of Burma and the Japanese mills and POSCO are similarly constrained in sales to the EC and the periphery of the EC (EFTA countries and Eastern Europe). Annual quotas are set by product, by country and by producer for exports in each direction. Special rules establish price floors and volume rules for China and the former Soviet Union, which are assigned to the Japanese and European spheres of influence, respectively. Attached to my testimony are two documents which were given to us by a Japanese trading company this spring. They show the quotas under the East of Burma Agreement for EC mills' sales into Japan and Korea for 1993, by company. The figures in the far right column represent the quotas. As you can see the Europeans are limited to minuscule tonnages, about 120,000 tons, far less than they would be able to sell in an open market situation. Several Japanese traders told us that the Europeans showed them these charts when explaining why they could not sell steel (above very small tonnages) to them for importation into Japan. We subsequently showed these same charts to an independent source in Europe intimately familiar with steel trade who confirmed to us that they were genuine. We believe that they are.

In case of violations, we are told that the East of Burma Agreement can be enforced in two ways: dumping of twice the tonnage in the home market of the violator, and deduction of a penalty from a fund established in a Swiss bank by cartel participants—a penalty equal to 20 percent of the value of the offending tonnage is deducted from the account of the violator.

The East of Burma Agreement is the subject of quarterly meetings between the Europeans, Japanese and Koreans where tonnages and prices are set and complaints about violations are addressed. The most recent meeting about which we have been able to learn in detail was in Marbella, Spain in March 1993.

The EC Commission and the Japanese government at one time (in the 1970s and early 1980s) appear to have played a direct role in negotiating restraint agreements between the EC and Japanese mills. The governments appear to have gradually disengaged from the process in the mid-1980s leaving the producers to negotiate price and market division agreements on their own.

Third, the Japanese mills, led by Nippon Steel, have negotiated a series of mill-to-mill agreements with various foreign producers to regulate the price and volume

[6] "One document memorializing a meeting of German, French, British, Luxembourg, and other European mills in August, 1980, makes references to price agreements with "the Japanese" and "the Swedes" affecting various world markets for wire rods. Two of the participants in the meeting, Mr. Hoorweg and Mr. Sevenig, were interviewed by the Washington Post in 1993, and confirmed their participation in market-regulating activities during the period in question.

[7] The Chairman of British Steel, for example, referred to it in a conference in Toronto in 1981. The industry journal *Metal Bulletin* commented in July 1993 that "steel companies have never admitted the existence of the London Committee, but it has been an open secret in the trade for many years." *Metal Bulletin* (July 5, 1993), p. 17. (Attachment 8)

[8] POSCO was reportedly incorporated into the Agreement in the spring of 1991.

of steel moving in both directions between each of these countries and Japan. In other words, the Japanese agree to limit the volume of their exports to each country, and to avoid price reductions below a specified level, and in return a similar pledge is given with respect to the Japanese market. Two-way restraint agreements have reportedly been negotiated with mills in South Korea, Taiwan, Brazil, Australia, New Zealand, Canada, South Africa, and Indonesia. These agreements appear to be essential to the functioning of the Japanese mills' domestic cartel, which is based on concerted restrictions on output which are designed to maintain a constant state of slight shortage of supply in the Japanese home market—and in this kind of a system, even a small influx of imports can be disruptive. According to the Japanese traders with whom we met, the enforcement of mill-to-mill agreements is based on the non-Japanese mills' fear of what the traders call the "total power" of the Japanese mills. The foreign mills are dependent upon the Japanese for technology and in some cases financial assistance and semifinished steel. The Japanese producers enjoy additional leverage because they buy large quantities of raw materials from some of the countries concerned, such as Australia, and can switch suppliers to show their displeasure. Finally, the Japanese mills have a large reserve production capacity and can dump in the home market of any foreign mill that does not toe the line.

When you put this all together, one sees a web of secret agreements that regulates much of the flat-rolled steel that is traded in the world. U.S. firms are often criticized for wanting their government to "manage trade," but in this industry at least, foreign producers appear to be actually *micromanaging* trade.

THE FOREIGN REACTION

The foreign reaction to our disclosures about international steel cartels in June was curiously muted. A few foreign steel executives made statements to the press denying that the cartels existed—one called it "incredible, a fairy tale." Reporters in the U.S. and Japan—while noting these denials—concluded on the basis of their own inquiries that the cartel stories were true and added new details based on their own interviews.[9]

But for the most part, the response of the foreign mills has been silence. They had an opportunity to deny these allegations on the record at the ITC hearing in June, and virtually all of them chose not to do so. They had another opportunity today. To date they have limited themselves to legalistic arguments in their briefs, arguing that our allegations are insufficiently documented and that there is not enough evidence on the record to support an ITC finding. Such statements beg the more basic question of whether they are or are not engaging in the cartel activities which we have identified.

One comment made by several foreign observers is that the cartels may have existed once, but faded away after the early 1980s. But the Marbella meeting in March of this year and the 1993 charts I have given you suggest that the East of Burma Agreement is alive and well today, and the web of mill-to-mill agreements involving the Japanese industry appears to have become more, not less extensive in the 1990s, extending to new countries like South Africa.

Another comment by foreign observers is that even if the cartels do exist, they do not actually affect the market. But if anything, the existence of cartels appears to be borne out by the trade flows—there is virtually no trade in flat-rolled steel, for example, between the EC and Japan or between Japan and Canada. An indicator that the cartels do have real effect is the fact that Japanese importers have been trying very hard this year to buy steel from the EC mills, and they have not had much success. Despite enormous surplus capacity in the Community—which places tremendous pressure on the EC mills to export—the European mills reportedly won't sell Japanese importers tonnages above the quotas set by the East of Burma Agreement.

And then there is the case of Spain. In the early and mid-1980s, Spain's shipments of flat-rolled products to Japan were more than 10 times greater than the entire amount shipped by all EC mills combined to Japan during the same period. This demonstrated, among other things, that transportation costs or other natural barriers are not an insurmountable obstacle to exports to Japan from the European region. But then, in the mid-1980s, Spain joined the EC and the Spanish steel mills joined Eurofer, the EC integrated steel producers' association. According to our sources, the Eurofer mills told the Spanish producers that now that they were members they had to reduce their exports to Japan sharply—and, in fact, Spanish ex-

[9] See attached articles from *Nikkei Business, Shukan Daiyomondo,* and the *Washington Post,* Attachments 4, 5, and 6.

ports to Japan dropped precipitously, bringing Spain in line with the rest of the EC.[10] The Eurofer mills reportedly explained the need for this sacrifice of their export business to their Spanish counterparts as follows: "You came here like lambs, but this is a war of wolves."

Finally if, as some observers say, the cartels have no affect on the market, one has to ask why busy senior executives from companies around the globe would bother to take several days out of their schedules every three months to gather at places like Marbella to engage in activities that have no relevance to anything.

WHY IT MATTERS

Why should foreign cartels matter to the U.S. steel industry? If foreign mills want to fix prices, allocate markets, and limit sales in various foreign markets, why not just let them do it? The answer is that this activity inevitably leads to dumping in our own market, and in some cases limits export opportunities.

There is a close nexus between cartels and dumping. In a high fixed cost industry like steel, the unit cost of production goes down dramatically as more units are produced, and it makes sense to run plants at maximum utilization rates. The commercial problem with doing this is that if one's competitors do the same, the result can be a glut and depressed prices. One solution common in foreign countries is to make anticompetitive agreements with other firms to limit sales volume in the home market, raise prices, and export the surpluses at whatever prices can be obtained abroad. The export outlet is crucial because if those surpluses cannot be disposed of somewhere, it is very hard to maintain the state of slight shortage in the home market that is needed to keep prices high. It goes without saying that this strategy requires the absence of effective antitrust enforcement. Import restrictions are also required so that the exported surpluses don't "leak" back into the domestic market. Both of those conditions have been present in many foreign countries in the steel sector. In addition, there is a truly enormous level of surplus capacity—in excess of 100 million tons—so there is great pressure on all producers to get surplus steel out of their own market and to sell it *somewhere.* Not surprisingly we have seen widespread dumping in steel.[11]

We believe that international cartels like the East of Burma Agreement—essentially a bilateral agreement between two regional cartels—have the effect of channeling exported surpluses by cutting down on the number of export markets where they can go. In other words, the surpluses dumped onto the world market by regional cartels in the EC and Japan are diverted by the international restraint arrangements into markets where access is relatively unrestricted. That is what we believe has happened in this country—a relatively open market—and is still happening. In the flat-rolled products, the Japanese export virtually nothing to Europe and the Europeans export almost nothing to Japan, but both the Japanese and Europeans export massive tonnages to the United States. The Canadian mills export almost no flat products to Japan and the Japanese mills export very little to Canada, but both the Canadians and Japanese export large tonnages to this country. The Europeans don't export much to Korea and the Koreans don't export much to Europe, but they both export large tonnages to the United States.

Finally, cartels perpetuate the global capacity surplus that lies at the root of the trade problems in this sector. In a competitive system like we have in the United States, when there is large excess capacity in an industry, the result is a shakeout. Price wars erupt. The less-efficient plants and companies are eliminated, and other producers downsize to keep their costs as low as they can. Supply adjusts to demand. That has happened in the United States in steel. It hasn't happened in Europe and Japan, however, where there is substantial surplus production capacity, precisely because cartels (together with subsidies) have prevented a shakeout from occurring—which is, after all, their primary object. Price competition has been contained, and firms and mills that would otherwise have disappeared have continued to exist, to produce steel, and to export it to the United States. As the head of the German Steel Federation put it a few years ago, the EC steel cartel enabled the German steel industry to survive "the deluge... within an air bubble artificially created by policy."[12] The existence of that surplus capacity abroad is why we have dumping here in the United States.

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[10] See Attachment 16.

[11] Since the late 1970s, there have been far more antidumping actions brought in steel than in any other U.S. industry.

[12] Dr. Ruprecht Vondran, interviewed in *Handelsblatt* (April 5, 1985).

POLICY IMPLICATIONS

U.S. companies are prohibited by the antitrust laws from forming their own cartels domestically and from joining international cartels. That is well and good. This prohibition reflects a broad national consensus that price fixing, rigging of markets and other similar anticompetitive behavior should not be tolerated in our society. But in steel and many other industries our companies are competing against firms that are not constrained in the same way. The great historian Alfred Chandler has called this divergence in competition policy the most important cultural difference between the United States and the rest of the world insofar as it has affected the long-term evolution of the modern industrial enterprise.[13] The question for U.S. policy makers is whether our legal remedies and our trade policies adequately take this difference into account. The experience of steel suggests that they do not, and I offer several observations as to why that is so.

First, we have an information problem. If the steel case shows anything, it is that Americans don't know enough about anticompetitive combinations abroad. The existence of the East of Burma Agreement, for example, was not, to my knowledge, known in the U.S. government, at least in upper levels of the agencies where trade and competition policy are formulated. The burden has fallen mainly on us, in the private sector, to develop this information, although our resources are limited, and we don't have subpoena powers and other tools available to the government. The poor quality of the information base available to policy makers is not so much an indicator that the government can't get this information as that it has not placed a priority on getting it. In 1916, soon after its formation, the Federal Trade Commission published an exhaustive two-volume study of anticompetitive foreign practices that affected American trade, based on reports from U.S. embassies and consulates abroad and interviews with many U.S. and foreign businessmen.[14] This study was encyclopedic in its depth and scope. If the East of Burma Agreement had existed in 1916, I have no doubt that this FC report would have uncovered it and written it up in detail. But our government by and large doesn't do this kind of work anymore, at least in the area of restrictive business practices; the emphasis is less on fact-gathering than on the application of abstract mathematical theories to economic issues.

This leads to a second problem, which is a thinking problem. It has been a widely held view of our policymakers that cartels are inefficient and that if our foreign competitors want to form them, we should go ahead and let them, since they are only hurting themselves. Former Assistant Attorney General for Antitrust William Baxter put it like this in 1983:

> *If our foreign partners form a classic cartel, what a cartel does is restrict output and increase prices. The restriction of output and the increase of prices by our foreign trading partners cannot possibly hurt us, can only help us in our international trading competition.*[15]

I don't believe that the framers of our antitrust laws would have agreed with this philosophy. They looked all around them and saw that cartels, or "trusts," as they called them, could compete with devastating effectiveness against competitors who refused to join. Woodrow Wilson, one of the leaders of the antitrust movement, put it like this in 1913:

> *[The independent firm] gets a local market. The big concerns come in and undersell him in his local market, and that is the only market he has; if he cannot make a profit there, he is killed. They can make a profit all through the Union, while they are underselling him in his locality, and recouping themselves by what they can earn elsewhere.*[16]

President Wilson was describing a situation very similar to what we see in steel today, although we have moved from a national stage to a global one. Our problem is that over time, at least in the international sphere, our antitrust policy has been driven more and more by economic theorizing about "rational" economic behavior than by empirical observation of real cartels in action. The theory holds, as Mr. Bax-

[13] Alfred D. Chandler, Jr., *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge and London: Harvard University Press, 1990), pp. 72-73.

[14] Federal Trade Commission, *Report on Cooperation in American Export Trade* (Washington: Government Printing Office, June 30, 1916).

[15] Speech of Assistant Attorney General William F. Baxter before the National Association of Manufacturers, May 10, 1983.

[16] Woodrow Wilson, *The New Freedom* (Englewood Cliffs, NJ.: Prentice-Hall, 1961), p. 108.

ter indicated, that we can ignore foreign cartels because they "can't possibly hurt us." Steel is a good indicator that the theory is wrong.

Third, we have an institutional problem. We have a trade policy apparatus that generally concerns itself with objectionable foreign *government* actions that injure U.S. producers, but which tends to steer clear of injurious *private* conduct, (with the exception of the antidumping laws). We have an antitrust policy apparatus that concerns itself with objectionable *private* foreign actions which injure U.S. consumers, but which avoids situations where foreign *governments* are involved and does not (with very narrow exceptions) concern itself with injury to U.S. *producers*. The kind of cartel activity we are describing here—anticompetitive *private* foreign conduct that hurts U.S. *producers*—tends to fall into the cracks between these two institutional structures. Under past Administrations, the Justice Department has placed little emphasis on defending U.S. commercial interests that are injured by foreign anticompetitive practices—there has not been much concern shown over the erosion of our industries, as long as prices remain low for consumers. It remains to be seen whether Department policy will change under the new Administration.

Practically speaking, U.S. industries have been left with the antidumping laws as their only recourse. The antitrust remedies haven't worked well for the beleaguered U.S. industries that have tried to use them against international cartels. The antidumping laws are an important tool but by no means a perfect one, as the steel industry has found. Moreover, they are now under concerted attack in the Uruguay Round by many of the same countries whose steel firms appear to belong to the cartels I have described.

That leads to a final problem, which is the international one. There is a growing tendency to prescribe some sort of multilateral legal framework as a way of resolving the kind of transnational economic conflicts that we see in steel. The problem with that approach is that it is not at all clear that there is a possibility of consensus among the leading trading nations over what multilateral competition policy should be. For example, the current EC Commissioner for Competition Policy, Karel van Miert, said earlier this year of the steel situation that

> *you cannot just say I will continue to apply the [competition] rules as strictly as before.... [We] are looking for another solution that could be more successful in driving prices back to their normal level.*[17]

Here one has the Community's equivalent of Ann Bingaman, its chief antitrust enforcer, talking about the need to bend the rules to help the steel industry get its prices up, a reference to the concerted production cuts that are now under way in the EC. If our Justice Department started speaking in this way, we would regard it as bizarre. But in the EC, Mr. van Miert's views are widely shared. Similarly, Japan's ambivalence to antitrust is well known and well documented—Naohiro Amaya, a former MITI Vice Minister, once characterized Japan's Antimonopoly Law, enacted under the U.S. occupation, as an alien protein injected into Japan.[18] Given the vast differences in national views which exist in this area, it would be unrealistic to expect some kind of multilateral agreement to fully resolve the kinds of problems seen in steel, at least over the short run. That is why Laura Tyson concluded in her recent book that antidumping measures are necessary as a crude buffering mechanism between economies organized under different rules—"a poor but necessary substitute for enforceable multilateral competition policies."[19]

It is common for witnesses to close their testimony with specific prescriptions for legislation or other policy measures. I am not doing that today, not because the problems are necessarily insoluble but because—frankly—we are still in the process of trying to identify what the solutions are. What we are grappling with here is economic conflicts that arise out of basic differences between capitalist systems that aren't particularly well understood in this country. The first step is understanding and defining the problem, which is arguably where we are now. Hearings like this are important if we are going to develop appropriate policy responses as I am confident that we can and will.

I am grateful that you have given me this opportunity to speak to you about these issues today.

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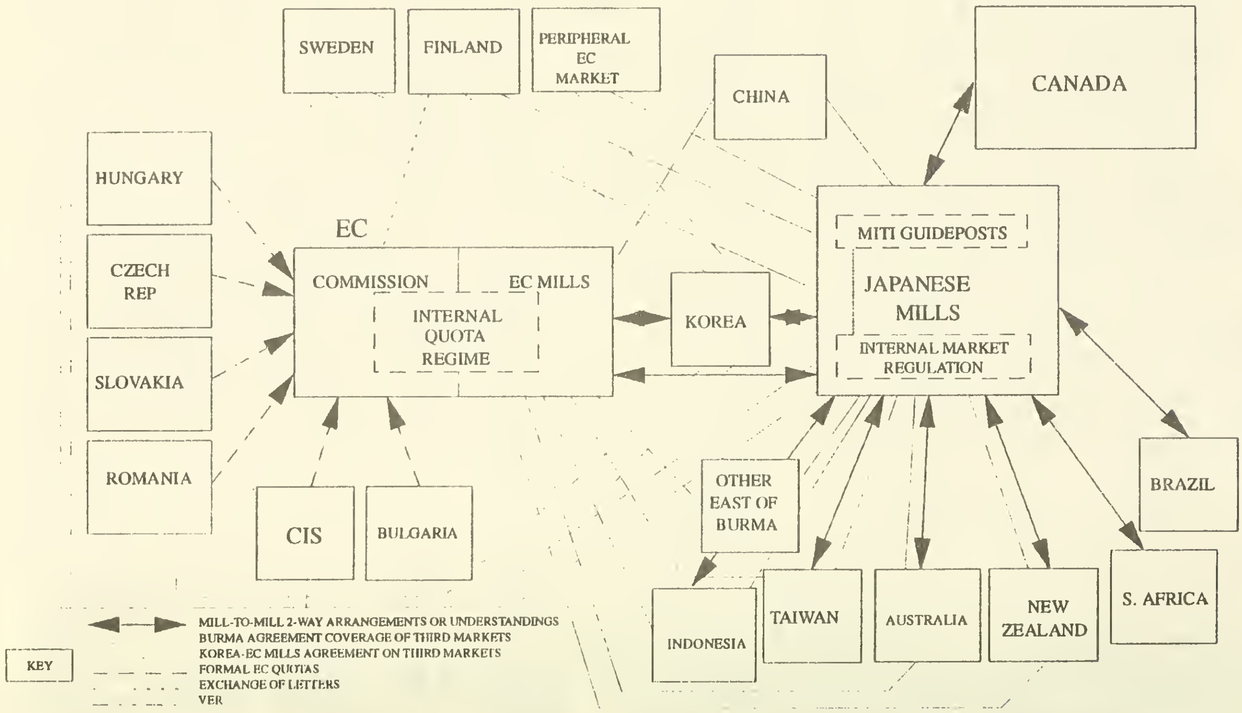
[17] Interview in *De Morgen* (Brussels, February 13, 1993).

[18] Interview in *Bungei Shunju* (December, 1980).

[19] Laura D'Andrea Tyson, *Who's Bashing Whom? Trade Conflict in High Technology Industries* (Washington, D.C.: Institute for International Economics, 199), p. 268.

INTERNATIONAL STEEL CARTELS



Attachment 1

INTERNATIONAL RESTRAINT ARRANGEMENTS IN STEEL (1993)

Agreement	Parties	Restraints	Coverage of Third Markets	Enforcement	Public/Secret	Origins	Renewal
1. East of Burma/ London Agreement	Eurofer Japanese Mills POSCO (Korea)	Volume, Price, Both Directions	East Asia, CIS, China, Periphery of Europe	Retaliatory Dumping (twice tonnage in vulnerable spot)	Secret	Early 1970s	Quarterly
2. Japan-Korea	POSCO Japanese Mills	Price, Volume Both Directions	--	Retaliatory Dumping Cutoff of Tech. Assistance	"Open Secret"	Early 1980s	Quarterly
3. Japan-Taiwan	CSC Japanese Mills	Price, Volume Both Directions	--	Retaliatory Dumping	"Open Secret"	Early 1980s	Quarterly
4 Japan-Brazil	Siderbras Group Japanese Mills	Price, Volume Both Directions	--	Retaliatory Dumping, Raw Materials Purchase, Tech. Assistance	"Open Secret"	Early 1980s	Annual
5. Japan-Australia	BHP Japanese Mills	Price, Volume Both Directions	--	Retaliatory Dumping Purchase of Raw Materials	Secret	Early 1990s	Annual
6. Japan-New Zealand	New Zealand Steel Japanese Mills	Price, Volume Both Directions	--	Retaliatory Dumping	Secret	Early 1990s	Annual
7. Japan-South Africa	ISCOR Japanese Mills	Price, Volume Both Directions	--	Retaliatory Dumping	Secret	1992-93	--
8. Japan-Indonesia	Krakatau Japanese Mills	Price, Volume Both Directions	--	Retaliatory Dumping	Secret	Early 1990s	--
9. EC-Romania/ Bulgaria/CIS	Government to Government	Quotas to EC Imports	--	EC Commission rules	Public	1993	
10. EC-Czech/Slovak	Government to Government	Quotas to EC Imports	--	EC Commission rules	Public	1992	

INTERNATIONAL RESTRAINT ARRANGEMENTS IN STEEL (1993)

Agreement	Parties	Restraints	Coverage of Third Markets	Enforcement	Public/Secret	Origins	Renewal
11. EC-EFTA	Government to Government	Understanding on Market Disruption	--	Consultations	GATT has been notified	1970s	
12. EC-Hungary	Voluntary Export Restraint	Volume	--	--	Public in Hungary	1992	

Attachment 2

JAPON.XLS

JAPAN

(in metric tons)

	1992	1993			
	TOTAL FINAL DELIVERIES	ORDERS BOOKED FOR DELI-VERY Q1	ORDERS ON NEGOTIA-TION Q1 + Q2	FURTHER EXPEC-TATIONS	YOUR TOTAL DELIVERY ESTIMATE
	(A)	(B)	(C)	(D)	(B + C + D)
H.R. FLAT					
Preussag	15 000 (1)	5000 (2)	5 000/10 000	5 000/10 000	15 000/25 000
Krupp	4 500	6 500	0	0	6 500
Klöckner	20 000	5 000	0	5 000	10 000
Ilva	0	0	0	10 000	10 000
Trade Arbed	1 195	0	0	2 000	2 000
British Steel	35000 (3)	0	10 000	10 000	20 000
SUB TOTAL	75 695	16 500	15 000/20 000	32000/37000	63500/73500
Ensidesa	66 010	26 890	0	3 000	29 890
TOTAL :	141 705	43 390	15 000/20 000	35 000/40 000	93 390/103 390
C.R.					
Sollac	19	0	0	0	0
Trade Arbed	1 572	0	0	3 000	3 000
SUB TOTAL	1 591	0	0	3 000	3 000
Ensidesa	100	0	0	0	0
TOTAL :	1 691	0	0	3 000	3 000
COATED					
Sollac	35	15	0	0	15
Hoogovens	26	8	0	0	8
TOTAL :	61	23	0	0	23
PLATES					
Dillingen	0	0	0	1 000	1 000
Clabecq	0	0	500	500	1 000
SUB TOTAL	0	0	500	1 500	2 000
Ensidesa	0	2 500	0	0	2 500
TOTAL :	0	2 500	500	1 500	4 500
TOTAL					
Thyssen*	0	0	0	10 300	10 300
Preussag	15 000	5 000	5 000/10 000	5 000/10 000	15 000/25 000
Klöckner	20 000	5 000	0	5 000	10 000
Krupp	4 500	6 500	0	0	6 500
Dillingen	0	0	0	1 000	1 000
Sollac	54	15	0	0	15
Ilva	0	0	0	10 000	10 000
Hoogovens	26	8	0	0	8
Trade Arbed	2 767	0	0	5 000	5 000
British Steel	35 000	0	10 000	10 000	20 000
Clabecq	0	0	500	500	1 000
SUB TOTAL	77 347 (1)	16 523	15 500/20 500	46800/51800	78823/88823
Ensidesa	66 110	29 390	0	3 000	32 390
TOTAL :	143 457	45 913	15 500/20 500	49 800/54 800	111213/121213

* Thyssen's total not distributed.

(1) : incl. 5 out of 1991, late arrival in early January 92.

(2) : original. booked for arrival in 1992.

(3) : 1500 shipped week 53/92.

ODS, Cockerill Sambre,
Hoesch (too early) : nothing

1.Fév.93

COREE.XLS

KOREA

(In metric tons)

	1992	1993			
	TOTAL FINAL DELIVERIES	ORDERS BOOKED FOR DELIVERY Q1	ORDERS ON NEGOTIATION Q1 + Q2	FURTHER EXPECTATIONS	YOUR TOTAL DELIVERY ESTIMATE
	(A)	(B)	(C)	(D)	(B + C + D)
H.R. FLAT					
Krupp	20 000	10 000	0	0	10 000
Klöckner	0	0	0	10 000	10 000
Ilva	12 963	0	0	21 000	21 000
Trade Arbed	0	0	0	5 000	5 000
SUB TOTAL	32963	10000	0	36000	46000
Ensidesa	40 892	0	0	0	0
TOTAL :	73 855	10 000	0	36 000	46 000
C.R.					
Klöckner	0	0	0	5 000	5 000
TOTAL :	0	0	0	5 000	5 000
COATED					
PLATES					
Dillingen	3 300	0	0	10 000	10 000
British Steel	4 800	2 000	2 000	2 000	6 000
Clabecq	0	0	1 000	0	1 000
SUB TOTAL	8100	2000	3000	12000	17000
Ensidesa	15 024	0	5 000	20 000	25 000
TOTAL :	23 124	2 000	8 000	32 000	42 000
TOTAL					
Thyssen*	200	0	0	18 300	18 300
Dillingen	3 300	0	0	10 000	10 000
Klöckner	0	0	0	15 000	15 000
Krupp	20 000	10 000	0	0	10 000
Ilva	12 963	0	0	21 000	21 000
Trade Arbed	0	0	0	5 000	5 000
British Steel	4 800	2 000	2 000	2 000	6 000
Clabecq	0	0	1 000	0	1 000
SUB TOTAL	41 263	12 000	3 000	71 300	86 300
Ensidesa	55 716	0	5 000	20 000	25 000
TOTAL :	96 979	12 000	8 000	91 300	111 300

* Thyssen's total not distributed.

DDS, Preussag, Cockerill Sambre, Sollac, Hoesch (too early), Hoogovens : nothing

1.Fév.93

Attachment 3

25.8.80 tlx 4927 hwg/lp

att'n mr:
slawik x
hanin/van doren x
donon/cuillovere x
fabbri x
bavister
sevenig
arnuzzo
[illegible]

copy mr:
schulte derne
waterhouse
crawley

x would you please pass on the following message to yr interested mills.

confidential
----
re.: export pricing wire rod

during our meeting of august 19 we have discussed the situation for wire rod in the export market and taken a number of decisions. moreover the total situation for steel products in export markets was discussed in the london committee of august 20.

for the sake of good order and referring to my tx nr 4532 of 21.[illegible].1980 in which i reported the results of our discussions with the japanese, i would like to confirm the following basic agreements.

1. japanese peripheral market
------
it is of eminent importance that we respect the coordination rules for this area in order to safeguard the cooperation with the japanese.

2. china
-----
the target price for 4th quarter shipments has been reconfirmed at us dlr 320 fob european port. under no circumstance are we allowed to underquote the japanese 2nd half 1980 price of us dlr 312.50 fob. in the meantime i will check with the japanese the information obtained concerning american (georgetown) bookings at us dlr 2[illegible]0.

i will inform the japanese of our decision as to the prices. it was agreed that we would enter negotiations with the russians at a price level of us dlr 340 fob stowed. the minimum price to be agreed upon with them will be us dlr 335 fob stowed.

arned confirmed the information that two offers (one of which from an eec mill) are reported by the russians to be made at us dlr 310 fob stowed. in case this offer originates from an eec mill it is hereby requested to withdraw this. the agreed minimum price of us dlr 3[illegible] appears already to be justified in view of the present market tendency and the prices already concluded for other products.

4. general exports
------
all mills personally committed themselves to respect the agreements which were reached with the japanese concerning general export prices. after the commitments we made and the positive reacti on this by the japanese we cannot allow ourselves a second time to change our price policy unilaterally. the exact prices for the various areas are given in my tx nr. 4532.

5. european peripheral market
-----
the swedish price was fixed as follows:
d 9-1 sw.cr. 1525 effective cif landed
all other qualities sw.cr. 1650 basis cif landed.
these prices which were agreed upon with the swedish are absolute minimum prices. please respect these prices and support the agreement made by mr taufflieb and mr engel.

for other areas the following prices were agreed upon:
norway dm 675 cif landed
finland dm 725 cif landed
portugal dm 735 cif landed
austria dm 735 free german/austrian border
for all the above areas quoted in dm, the german extras are applicable.
switzerland sfr 660 free basel with a negotiation margin of sfr 20
dollar quoted areas us dlr 332 fob.

kind regards
hoorman
--

Attachment 4

Translation from Shukan Daiyamondo (August 7, 1993)

OW1808032793 Tokyo SHUKAN DAIYAMONDO in Japanese 7 Aug 93 p 16

[Text] When you hear reports of "a mysterious international cartel Japan has formed with Europe..." it sounds like a spy novel, but actually, such an agreement exists in the steel industry. Well-informed sources disclosed facts about the cartel which have never before been brought to light.

"During the latter half of the 1970's, driven to the wall by Japanese steel manufacturers' exports, the Europeans made a proposition to Japan and formed a cartel. Drawing the line along Myanmar (the former Burma), and dividing the market between Europe and Japan, it was called the 'Burma Agreement' or the 'London Agreement.' It continues today, even including Taiwan and South Korea, which have developed their own steel industries."

Once every three months the cartel holds a detailed consultation meeting in a European or Asian city in order to coordinate their output with one another. Once in a while, reports of such an arrangement are whispered in rumors, but Japan's steel manufacturers consistently say: "We have never heard about it," denying the cartel's existence.

However, things have suddenly changed. It is said that the Clinton administration has obtained data concerning the cartel's existence, and it will launch an investigation to uncover the "Burma agreement."

A person concerned with the steel trade voiced severe criticism: "Import restrictions through the international cartel mean the steelmakers are making Japanese users suffer the consequences of their failure to undertake restructuring."

Nonetheless, some people are worried that the Clinton administration, annoyed by its unprecedented unpopularity, might take premature action, and this may "become fetters for its own bondage." A well-informed source on the U.S. steel industry said: "At present there are many cases in which the U.S. steel manufacturers share mutual interests with their Japanese counterparts by accepting capital participation or establishing joint ventures. Owing to the international cartel, steel product prices are stabilized, and this contributes to the business results of U.S. enterprises."

He further analyzed that Japanese automobile manufacturers and other users would benefit from the exposure of the international cartel. He said: "At present, steel materials imported to Japan are held down to the tune of 5 or 6 million tons per year, approximately 7 or 8 percent of the total amount of consumption. Consequently, car makers and other industries troubled by the appreciation of the yen cannot increase their import of steel materials made in Taiwan or South Korea, which are relatively cheaper because the foreign exchange rate is linked to the U.S. dollar, and thus, their businesses are only getting worse."

Therefore, if the restriction imposed by the cartel were removed, cheaper steel would flow into Japan in large quantities, with the potential of affecting a rapid revival of the Japanese industrial sector. The intended bashing of hateful Japan may stir up a hornet's nest, while on the other hand, a truly troublesome problem is also in the offing.

"U.S. Trade Representative Mickey Kantor's knowledge of the cartel's existence aggravated his distrust of the entire Japanese business circle, and has stiffened his attitude toward them," (according to the above-mentioned, well-informed source).

Although the clamp down on the international steel cartel was caused by U.S. President Clinton's overplaying his hand, it will inevitably inflict an adverse effect on Japan-U.S. economic relations. It is not unlikely that the United States will make new demands.

Attachment 5

Translation from:

NIKKEI BUSINESS JULY 5,1993 ISSUE, pp. 19-22 A Special Edition

Concerning A Hot Bed of Non-Tariff Barriers

Quantity of steel exported to Japan from the countries in the world is completely controlled by the steel industry business circles in Japan.

* * *

An administrator of a steel manufacturer testified that "In actuality, the quantity of steel exported to Japan from the countries in the world, except the United States and old Soviet, is almost completely controlled by the Japanese steel industry business circles." According to him, the steel industry business circles of Korea, Taiwan, Brazil and EC who are eager to export their steel to Japan, and the steel industry business circles of Japan have been secretly contracted gentleman's agreement, setting up a framework of self-imposed regulations concerning export. He continues, saying that "The Korean manufacturers who are located in short transport distance are saying that they would like to increase their exports to Japan. However, if they export more to the Japanese market, the Japanese manufacturers will do dumping conversely to the Korean market, and they may bash the Korean manufacturers, so that they abide by the inevitable and make their own framework for their export to Japan."

If this is true, the Japanese steel manufacturing circles are practicing the international black cartel act. In actuality, the import quantity of common steel material to Japan has suddenly increased in 1980's. In 1988, it was more than 6,000,000 tons. However, even during the height of bubble economy, the import quantity was 6,000,000-7,000,000 tons and it remained on the same level basically.

There is another shocking accusation. In March of this year, AISI made public a paper asserting that the control of the quantity of steel production is intentionally practiced by the private business circles and the administrative agency in Japan. USTR of course showed interest concerning this. The Japanese steel market is newly added as a problematic item in the 1993 issue of the International Trade Barriers Report issued by USTR at the end of March.

Demand outlook of the material made by the Ministry of International Trade and Industry is in almost accord with the quantity of the crude steel production.

The largest problem, which was pointed out in the paper, was the demand outlook of the steel material issued quarterly by the Ministry of International Trade and Industry (Guidepost) and the production adjustment, which was conformed to the demand outlook,

of the steel industry business circles. It pointed out that the price is maintained by adjusting the production quantity by each of the Japanese steel manufacturers. According to the guidepost of the Ministry of International Trade and Industry, this actual cartel is to grant a certificate or a charter. Furthermore, it points out that the existence of the business circles such as the Japan Steel Federation and Japan Steel Club is the place to form the agreement to stabilize the shares, and it is trying to control the total of production quantity.

When the production quantity of the crude steel, which is announced quarterly in 1992, and the outlook, which was issued by the Ministry of International Trade and immediately before the end of the quarter are compared, the difference is within 3% in most cases. On the other hand, the price of hot coil for large Japanese consumers is about 60,000 yen. However, the loading price at the domestic market is less than $300 generally. The price difference for the domestic and the foreign materials is clear.

Furthermore, during the past 10 years, the ratio of crude steel production quantity of 5 large blast furnace manufacturers, namely Nippon Steel, NKK, Kawasaki Seitetsu, Sumitomo Kinzoku Kogyo, and Kobe Seikosho has not been changed greatly. Concerning the share of Nippon Steel, which showed the largest variation among 5 large manufacturers, the variation is about 0.4% from 41.3% in 1983 to 40.9% in 1992. Concerning NKK, it has been 17.5%

A certain OB (old boy) of a large blast furnace manufacturer explained. "There is an agreement concerning the share stabilization among the steel manufacturers who are the members of Japan Steel Federation. The above is a matter of common knowledge among the business circles. If the present method is simplified, first of all, Nippon Steel decides the production quantity, the production quantity for each of the remaining blast furnace manufacturers are automatically decided in accordance with the fixed shares. The Ministry of International Trade and Industry asks apprehension simply to each manufacturer other than Nippon Steel. After that, the production quantity for Tokyo Steel, who is not a member of the Japan Steel Federation, is asked, total crude steel production quantity is decided, and this is announced as "outlook." Therefore, it is natural that it is accurate. The price maintenance by the production adjustment is only possible when the low priced imported goods are shut out of the domestic market. AISI pointed out in the paper previously quoted that there is unfair agreement between Japan and the steel exporting countries other than the United States, and as a result, the export pressure is heightened for the U.S. market. Indication pointed out by AISI is the same as that of the corporation manager previously quoted. Pursuit at the MSA conference in future is appealed to the U.S. government.

In actuality, the blast cartel at home, or "gentlemen's" agreement between Japan and EC and between Japan and Korea have been pointed out as an "open secret" for a long span of time. Concerning this matter, Nippon Steel, the leader of the steel industry

business circles asserts that "I have not heard the words such as international black cartel or black cartel being entangled with the Ministry of International Trade and Industry. The reason for small share variations of the blast furnace manufacturers is merely the result of the competition."

The Ministry of International Trade and Industry, which was pointed out as a controller of the black cartels by the U.S. Business circles, refutes that "there is no possibility for the Ministry of International Trade and Industry to meddle regarding to the production quantity of the private steel manufacturers." (Tsutomu Makino, Chief Secretary). However, a route for the appointment of a former government officials to a responsible position in Nippon Steel is maintained. Furthermore, various public corporations of steel connection such as Japan Steel Federation are also having plural number of appointments of former government officials to a responsible position. It is almost inevitable that this type of situation is to be interpreted as a design for the governmental agency in supporting "orders" of the private business circles.

Attachment 6

Washington Post July 23, [illegible]

Allegations of a Secret Steel Agreement

Attorneys Cite Documents to Back Charges of Price Fixing by European, Japanese Mills

By Peter Behr
Washington Post Staff Writer

On April 7, a steel importer in the Japanese port city of Osaka did something almost unthinkable in his country's tightly knit business community.

He wrote a letter to the American steel industry accusing his country's steelmakers of operating a private cartel to rig prices and control steel shipments into Japan and surrounding Asian nations.

Representatives of Japan's five major steel mills "periodically meet and negotiate with overseas mills except those in the U.S.A. and Eastern bloc countries," the Osaka importer wrote to the American Iron and Steel Institute, a trade group. ". . . Of course, such negotiations are always conducted confidentially, but most of the steel industry people know the facts."

In an interview, the Japanese steel trader, who declined to be identified, said he sat in those meetings in the 1970s as an executive for one of the big Japanese mills before forming an importing company.

Long rumored outside the industry, the existence of "gentlemen's agreements" among Japan and European major steel mills to control steel trade in their two regions is explicitly denied by some industry's leaders.

"Incredible, is my comment," said Eishiro Saito, former chairman of Nippon Steel Co. and one of the leaders who rebuilt Japan's steel industry after World War II. "We have never been nor will we ever become a party to any such mechanism of controlling steel imports. I think that is a plain fairy tale."

But in interviews, two retired European steel executives said that beginning in the late 1970s they had met with steel company officials from competing European and Japanese firms to seek agreements on setting prices of steel exports.

"Steel industry people do consult with each other," said Rudolph Hoorweg, a retired executive of Nedstaal, a German-owned steel company in the Netherlands. "We do not consider it to be illegal or improper."

Pierre Sevenig, a retired steel executive from Luxembourg, said he had participated in meetings with Hoorweg in the early 1980s and said he believed that similar meetings were ongoing last year, when he left his company.

"It was not formally stopped," he said. "The enthusiasm vanished [as competition increased]. It continued to meet, but the discipline relaxed quite significantly." The arrangement is "sleeping," he said.

The charges, bolstered by documents obtained by The Washington Post and attorneys for U.S. steel companies, come at a critical time for steelmakers in the United States, Japan and Europe, all of whom have suffered huge losses from recessions in the industrial world.

Twelve major U.S. steel companies have accused steelmakers in 19 countries of violating U.S. trade laws by dumping steel in this country at unfairly low prices and by taking advantage of extensive government subsidies to keep unprofitable plants running.

If the U.S. industry wins its case before the U.S. International Trade Commission next week, the foreign steelmakers would be hit with heavy penalty duties that would price most of them out of the U.S. market, perhaps for years.

Foreign steelmakers say it is stiff domestic competition, not imports, that has caused the big U.S. steel companies to lose money since the late 1980s.

Robert E. Lighthizer, an attorney for U.S. firms, told the ITC that the alleged agreements limited opportunities for American mills to sell abroad and forced U.S. steel product prices lower by intensifying competition here.

Over the past two decades, the United States and the European Community have entered into official agreements to protect domestic steel industries by limiting imports from other steel-making nations. A confidential minutes of meetings chaired by Hoorweg from 1979 to 1981 that show efforts to fix prices on wire rods, a common steel mill product. The documents also show the European and Japanese executives agreeing not to start price wars in each other's home markets or exceed mutually agreed on limits for exports to each other's markets.

A memo marked "confidential" signed with Hoorweg's name and dated Aug. 25, 1980, obtained by The Washington Post, discussed a meeting of European steel executives earlier that month. "All mills personally committed themselves to respect the agreements which were reached with the Japanese concerning general export prices," the memo said.

The document also notes specific prices to be charged on shipments to Norway, Finland, Portugal, Austria, Sweden and the Soviet Union.

In the interview, the Japanese trader said he wrote the letter because the alleged agreements are preventing him from buying lower-priced foreign steel to import into Japan. Mills in Europe and South America refuse to sell steel to him because they are unwilling to exceed confidential limits that govern steel imports into Japan, he said.

In the late 1970s and early 1980s, Hoorweg, the Dutch steel executive, said he chaired a committee of European steel company officials who met regularly to discuss prices and export goals of steel wire rod from Europe.

The group was part of a larger organization of European steel executives called the London Committee that reviewed overall steel exports from Europe, Sevenig said. Subgroups such as Hoorweg's dealt with specific products, such as wire rods.

At times, Japanese executives attended meeting with the European executives, Hoorweg and Sevenig said.

"They were dominating trade," Sevenig said of the Japanese. "We had to adjust our policy."

The minutes of the wire rod committee show Hoorweg imploring other company executives to stick to their agreement limiting shipments to Japan.

Sevenig said the members exchanged information on prices and shipments in a "rather loose way, based more or less on good will. It was an exchange of views, freely accepted limitations with no formal agreement whatsoever," Sevenig said. "Some kind of gentleman's agreement."

"The influence of the London Club should not be over-estimated," Hoorweg said. "It was consultation."

Sevenig said "the London Committee was still holding meetings during the depressed period of 1982-1983, but the agreements were not always fully respected. It was some attempt to limit the damage and to have some discipline. . . . It helped to have some understanding."

The current status of the London Committee "is not an easy question."

Washington Post July 23, 1993

Memos Allege Steel Cartel in Europe

Attorneys for major U.S. steel companies have obtained copies of what they say are confidential documents showing a European steel cartel at work.

A Jan. 31, 1979, memo on the corporate stationery of a Dutch steel executive describes the formation of a committee of executives from competing European companies whose goal was to keep Japanese steel from overrunning their markets.

To buy peace with Japanese mills, the European producers agreed to limit their shipments to Japan and other Asian countries, according to the documents.

The memo was sent over the name of Rudolph Hoorweg, then an executive of Nedstaal, a German-owned steel company in the Netherlands. In an interview, Hoorweg said he chaired the committee. He recalled that he may have written minutes of its meetings, but said he was not sure.

"I have received your personal assurance that you will not deliver any wire rods into the Japanese semi-home market [areas adjacent to Japan] if not expressly coordinated with the Japanese via me," the memo said.

"We must make sure together that we continue this cooperation and share the positive result," it said, an apparent reference to the agreed-on prices.

"All [European] mills personally committed themselves to respect the agreements which were reached with the Japanese concerning general export prices," said a Aug. 25, 1980, memo over Hoorweg's name, also marked "confidential."

As the steel market became more competitive in the early 1980s, the wire-rod agreement became harder to maintain, the documents showed.

"The export markets seem to have gotten out of control," a memo dated July 15, 1980, reported. "With a declining demand and simultaneous supply pressures from companies in the U.S.A., Canada, South Africa, Spain, Korea, etc., the prices are under pressure in all regions."

The European mills accepted Japan's "leadership" in exporting to China with the promise that the Japanese companies would permit the European mills to set prices for Russia and not undercut them, the memos showed.

— **Peter Behr**

Attachment 7

PaineWebber **Excerpt from Paine-Webber Steel Strategist #18 (March 1992)** WORLD STEEL DYNAMICS

What are the odds of a steel shortage in 1995 given various scenarios for Western World steel production? We work out the figures in Exhibit J (1 of 5), which is a probability tree analysis. For 1995, granted high-end steel production of 525 million tonnes (versus 490 million tonnes in 1991), the odds of a steel shortage are about 88%. Granted mid-range steel production of 490 million tonnes, the odds of a steel shortage are figured to be 61%. Given low-end output of just 440 million tonnes, the odds of a shortage are estimated to be 6%. Overall, the odds of a shortage are 55%.

Turning to steel pricing circumstances in the major countries:

- The E.C. mills in early 1992 are pushing for a 20–30 DM/tonne rise in the spot market because it is so badly needed. Already, steel prices for delivery to the automotive sector in 1992 have been negotiated at lower levels than 1991. Hence, if the mills are to have even flat price realizations in 1992, they must have this price increase. The increase applies to strip mill products such as hot-rolled, cold-rolled and galvanized. It does not apply to plate, which is still falling. To get the increase, the producers must hold products, such as strip, off the market. The mills must be prepared to accept a loss of volume.

  A most interesting development during the past year has been the exporting of some flat-rolled steel to Japan by several European mills. This seems to be inconsistent with the alleged "gentlemen's agreement," whereby the mills basically stay out of one another's home markets. Why has there been such a development, although the tonnes involved have been small? It may be that the EC mills wanted to show the Japanese that this can be done. This could be viewed as a kind of warning (a shot across their bow) to the Japanese to stay away. Also, it may have been that some Japanese customers were demanding this steel. Steel price levels in Japan are high by international standards.

  On the European continent, we see a strong connection between the intra-EEC price (which we monitor at the French-German border) and the world "spot" export price). This can be seen when examining Exhibit I (6 of 6). The French-German border composite price, which rose above 1000 DM per tonne in 1985, fell to about 865 DM per tonne before rallying back to the 1000 DM per tonne level in late 1989. It has subsequently fallen to about 900 DM in Q4 91. We expect it to drop to about 800 DM per tonne in 1993 before rallying. In dollar terms, however, the price soared with the strengthening of the dollar, from $350 per tonne in 1985 to $554 per tonne in late 1989 and to $628 per tonne in late 1990. The figure in Q4 91 was $555 per tonne.

- An important pricing event occurred the summer of 1991 when the Japanese steel mills put through a 4% Big Buyer price increase. This was the first boost since 1982. According to trade press articles, hot-rolled sheet rose about 5,500 yen per tonne, cold-rolled 4,000 yen and galvanized sheet 4,500 yen. Some of the price increases may have been effected via the route of boosting charges for "extras." These new prices have yet to appear in Kensetsu Bukka, which is a monthly publication containing reference list prices for many products when contractors bid for government contracts.

  The Japanese Big Buyer composite list has been cut about 25% since 1984. Nevertheless, at the late 1991 exchange rate, the Big Buyer price was still above price realizations elsewhere. For example, at 77,500 yen ($598) per tonne, our Japanese Big Buyer composite price is about 18% above the $506 per tonne composite figure for the United States. We expect Big Buyer prices in yen terms to erode to a level of about 75,000 yen ($682) per tonne by 1995.

  Japanese "dealer" prices, after having run up sharply in late 1987-early 1988, backed off somewhat and have stabilized at the 87,000 yen level. In 1991 the weakening Japanese economy has led to price weakness. The Japanese composite dealer price has dropped from 87,374 yen per tonne in Q1 91 to 85,000 yen in Q4 91.

- In the United States, the normal optimism for a pickup in the first quarter is largely missing among our contacts. They say the traditionally best months of their sales year — March, April, May — will see continued declines that will not be made up during the balance of next year. Our indicators of spot versus contract hot- and cold-rolled sheet prices indicate that the relative low point for the spot price was reached in the fall of 1991.

  Tier II mills are taking a less aggressive pricing posture relative to the Tier I mills than in the past. This appears to reflect both the weakened financial positions and their knowledge that the Tier I mills no longer are overlooking the aggressive pricing actions to the same extent as in the past.

  A factor supporting prices is the mills' collective knowledge that further sizable price cuts would be suicidal. This factor has banded together the U.S. flat-rolled mills to a greater extent than at any time during the past decade.

  Spot prices although weakened are still up sharply since the low point in late 1985. Class II cold-rolled sheet has dropped to about $450 per net ton in 1991 from a high of $502 per ton in 1988 and a low of $400 per ton in 1985. Prices in the spot market tend to be negotiated quarterly, or on an order-by-order basis in some instances. In the contract market, pricing tends to be established on an annual basis, although there may occasionally be reopeners or renegotiations during the course of the year.

Attachment 8

Metal Bulletin, July 5, 1993

US cartel claims are 'overdone'

ALLEGATIONS by US steel companies that European and Japanese mills had secret arrangements to restrict international trading have been confirmed by independent steel traders. However, the cartels no longer have any effect on the market, and there is no evidence that they resulted in dumping in the USA, as the Americans have alleged (MB July 1).

Lawyers representing US steel mills last week claimed that foreign steel companies or their governments have set up 14 separate "international steel cartels" which affect trade between Europe, Japan, Canada, Korea, Australia, South Africa and several other countries. Some of these deals are open and public — like restrictions on EC imports from Efta and east European countries — but others are secret.

The oldest of the secret deals cited by the American mills is the EC/Japan arrangement, which amounts to a non-aggression pact covering each other's markets. US mills claim this dates from the early 1970s and is run by a shadowy "London Committee" which was supposed to prevent disruptive market behaviour by EC mills in Japan and by Japanese mills in Europe: according to some trade sources the agreement also regulated shipments into third country markets that were regarded as Japanese or European spheres of influence — particularly in Asia east of Burma.

The agreement covered integrated mill products including strip, plate and heavy sections, plus intermittently wire rod and stainless coil.

Open secret

The mills allegedly involved in this arrangement have never confirmed it, but there is no doubt that the London Committee existed in the early 1980s, because the then British Steel Corp chairman Ian MacGregor referred to it publicly as a forum for discussing international steel trade questions.

The occasion was the International Iron & Steel Institute meeting in Toronto in October 1981 and — then as now — exports to the USA were being threatened by dumping action. After a meeting of Eurofer mills in Toronto to discuss the trade crisis, MacGregor said the matter could be referred to the London Committee. At that time the Committee was co-ordinated by Don Crawley, then director of international affairs at British Steel Corp, who died earlier this year.

Steel companies have never admitted the existence of the London Committee, but it has been an open secret in the trade for many years. Several independent traders have now confirmed its existence and given their view of its role.

From time to time in past years traders have complained about the limits on international business that the committee allegedly enforced. One highly experienced trader involved in exports from Europe told MB there was an "understanding" between EC and Japanese mills in the early 1970s that they would not behave disruptively in each others' markets, but he thought the agreement had broken down and was no longer in effect.

Another trader told MB he is certain that there was a "gentlemen's agreement" dating from around 1980 between the EC and Japan which set tonnage limits on EC exports to Japan and Southeast Asia, and on Japanese exports to Europe. At that time, as part of the EC's Davignon Plan of anti-crisis measures, the Commission negotiated quotas on imports from several sources including Japan. But no formal curbs were placed on EC exports.

Cheating

A Europe-based trader said he thought the London Agreement had broken down completely because of "cheating", and in his experience it no longer affects trade. But another added: "I've never seen anything on paper, but some mills are still reluctant to ship to Japan", although it seems many mills no longer respect whatever restrictions the Committee was supposed to lay down.

However, trade statistics indicate the Japanese mills never took up more than half of their allocation for the European market during the 1980s: one reason is the low prices prevailing in Europe. In Japan, EC mills hardly figured as sellers, even though Brazilians, Koreans and others showed it was possible to penetrate that market.

A third trader said that in the 1970s there were "lots of agreements" between mills. Some were for particular products like tinplate and pipes, and some for various regions of the world, "but there was nothing in writing". The trader added: "they all disintegrated".

The US mills also claim that the EC has a similar cartel with Korea, and that Japan has separate bilateral trading arrangements with Korea, Taiwan, Brazil, Australia, New Zealand, South Africa and Indonesia. All these deals are supposed to regulate both the volume and price of steel shipments in both directions, according to the Americans.

There is little evidence of how effective these trade restraints are: if their aim was to restrain imports into Japan then they were singularly ineffective, since Japanese imports have more than quadrupled over the last decade — from 2m tonnes in 1982 to more than 9m tonnes in 1991.

Attachment 9

Metal Bulletin, May 27, 1993

Latin American mills win strip price rises

BY MB STAFF IN RIO DE JANEIRO AND LONDON

LATIN American strip mills are having more success in raising third country export prices than their European competitors, as traders start selling through the third quarter.

Brazil, which dominates South American exports is getting better prices than in Q2 on all products. Europe, meanwhile, has forced a rise in cold reduced coil but lags behind on hot rolled and galvanized, traders report.

Chinese demand has boosted Latin American prices in particular due to the big tonnages sold in that market. The Europeans have not enjoyed the same volume of export sales to China, Latin American traders say. Over five years, they put Latin American sales to China at 4-5m tonnes, adding that the region has a stronger tradition than Europe in exporting to Asia/Pacific markets.

Brazilians claim also that Europe's sales in China suffer from their gentlemen's agreement with Japan and South Korea not to interfere in Asia/Pacific markets.

With big exports booked, increasing domestic demand in various countries and the odd production hitch, Latin American availability is well down on some products. CR coil is especially short. If demand from China stays strong, it is expected to lead to further rises in Latin American export prices, although some trade sources predict a fall-off in Chinese purchases could take place from November.

HR coil exports have shown the biggest price increases in recent weeks. Brazil-based traders confirmed the net mill price for HR coil produced in the country is now some $300-305 per tonne fob. Output is reported fully booked until September. One trader spoke of orders taken for shipment at $350 a tonne c&f Philippines.

The low availability of CR coil is due mainly to higher demand from Brazil's car industry, which is at record production levels. CR capacity is now said to be insufficient to meet demand.

The shortage will not ease in 1993. Latin America is apparently not exporting CR coil to China. Prices, largely hypothetical, are quoted at anything over $375 a tonne. One trader even put them "above $400".

Galvanized coil, which China buys from Japan, is described by Brazil-based traders as still relatively depressed at some $440-460 a tonne fob Latin America.

European mills, meanwhile, are at least back in the third country markets after a fallow period when material ran out for Q2. Lead times are still long but traders do not expect shortages in Q3, when domestic activity is at its low point.

Traders report some demand in the Middle East and North Africa as well as in China and the rest of the Asia/Pacific region.

HR coil prices for July/August delivery are stuck firmly at Q2 levels of $270-280 per tonne fob. Mills want higher rates but are prepared to sell at these levels.

"Even though they would like more, they can at least live with these prices," said one trader. Most feel that there will be an increase eventually this year but not before Q4.

European mills' prices for CR coil have moved up some $10-20 per tonne to $380-395 per tonne fob, though not every customer will pay so much. Mills can get these levels from end users, it is thought, but not from large traders. European sellers can at least benefit in this market from the lack of material available in Brazil.

Galvanized coil prices from Europe are still held back by over-supply. Traders put present levels at $430-450 per tonne fob, which is a slight improvement over Q2 but still a very low margin compared to CR coil.

The Chinese market is still causing worries in both Europe and Latin America, where exporters are still very dependent on the large quantities bought there. Ever since the boom began last year, there have been concerns over the security of future demand.

Various traders feel that China is unlikely to maintain its current high rhythm of steel purchases throughout 1993.

They point to the possible emergence of inflation-related problems and port congestion, with reports of up to $16,000 a day paid by shipping con-

Attachment 10

Translated from Nihon Keizai Shimbun (June 12, 1992)
Excerpt from Article Entitled "Breaking Down the Dependency of Industries on the Government" (Part 6)

Moreover, these corporations are often used like tools of the government. For instance, MITI's Iron and Steel Administration Division, which publicly forecasts supply and demand for iron and steel every three months, uses industrial groups such as the Japan Iron and Steel Federation and the Kozai Club to handle the "hearing" of a certain sector of the "user" industry. Furthermore, the Iron and Steel Administration Division attends meetings of the Japan Machinery Federation twice yearly to find out production prospects for the machinery industry.

The joint government-private bodies are often more bureaucratic than the government offices. For instance, the Japan Iron and Steel Federation centers on five major blast furnace companies. It is taken for granted that the federation's chairmanship will be served concurrently by the chairman of Nippon Steel Corp. Hiroshi Saito, the current Nippon Steel Corp. chairman, even remarked: "The chairman of Nippon Steel Corp. should be qualified to serve as chairman of the Japan Iron and Steel Federation."

However, an anonymous iron and steel company president complains: "Only the blast furnace companies benefit from joining the federation, but we do not." The managing director's meeting, which is attended by company presidents every other month, "discusses nothing new, because everything has been decided by the committee. We only talk about matters such as contributions to preserve cultural properties," he adds.

Then what is the mission of the Japan Iron and Steel Federation? A certain OB executive of a major blast furnace company stated: "Its mission is to stabilize market 'shares.' Although we talk about protecting small and medium-sized enterprises, the mechanism of the industry awards companies that hold the highest market share." The highest market share for blast furnace crude steel, excluding electric steel, is held by Nippon Steel, which held a stable 38.4-percent share 10 years ago and currently holds a 36.8-percent share. There has been little change in the share of lower-ranking manufacturers.

The government and civilian bodies have worked together to achieve "cooperation" and "order" so as to promote the interests of individual companies, industries, and even further, the interests of our nation. However, when growth slows down, this becomes a "cartel." And companies are not assured of future growth by waiting patiently. Rather, the restriction on competition will weaken the companies, industries, and will cause a split in this trinity. These joint government-private organizations are urged to reexamine the hidden side effects caused by their "dependency on the government."

Attachment 11

METAL BULLETIN MONTHLY (MAY 1991)

nes last year, up 37% on 1989. North Korea's exports to Japan, usually channelled through Hongkong and Macau-based traders, reached 75,547 tonnes last year, of which all but 3,300 tonnes was hot coil.

Wazai has also bought plates from Hindustan Steel's Bhilai works in India and, though not recently, some HR coil from Krakatau Steel in Indonesia. With the Indonesian economy booming, an aggressive export pricing policy by Krakatau and its own increased demands for hot coil for its CRMI cold-rolling operation, Indonesia's exports to Japan last year slumped by two thirds to just 133,220 tonnes compared with 311,181 tonnes in 1989.

It is with Posco that Wazai's links are strongest, with the company handling about 10,000 tpm of Posco material. But this raises a few interesting problems.

The HR material which Wazai imports worldwide is for supply to ERW pipemakers and, to a lesser extent, cold reducing and coating mills. Wazai boasts that it supplies all of Japan's major pipe makers except Toshiba Pipe (which belongs to NKK) and Daiwa Kokan (part of the Nippon Steel group). The larger companies, such as Maruichi Steel Tube, usually have their own slitting facilities but there are many which do not. So when Wazai makes a sale to a smaller mill, part of the deal is that Wazai will deliver it to a coil centre for slitting before sending it on to the mill. Last year, Wazai was rudely reminded of the risks involved in doing business this way.

"During 1989 and 1990, Japan's steel industry was booming and demand was very strong so all coil centres were very busy," recalls vice-president Nakasaka. "Most coil centres are either directly or indirectly connected with a major mill and all were busy fabricating domestic coil, so when we came along with our imported material we were asked to wait. This delayed our deliveries to our users, and this in turn delayed new orders," he told MBM.

The obvious answer would be for Wazai to establish its own coil centre in Japan and this is precisely what the company is planning. In fact, the company is looking to build two centres — one near Osaka to serve Kansai-based customers and one near Tokyo to service Kanto clients. Both would have a capacity of about 20,000 tpm and would treat mainly CR and HR material, although Wazai is also aiming to step up imports of higher value steel such as stainless and galvanized sheet.

Hori has called on some old friends, now retired from Kobe Steel, to do the engineering for the slitting, levelling and shearing lines. A small problem is that Wazai is still negotiating for the purchase of the necessary land but Hori is hopeful the deals will be completed by the end of this year and the plants commissioned by the autumn of 1992.

An interesting twist to all this, however, was a report in March in a South Korean newspaper suggesting that Wazai was intending to form a joint venture with Posco and Korean trader Daewoo to build and operate the centres. The three would form a joint venture with Wazai holding 60%, Daewoo 30% and Posco 10%, the report said. Although Nakasaka acknowledged the sound business sense of locking Posco into a share-holding agreement which would guarantee the centre tonnage, he denied that the venture would have any South Korean representation.

> "With the Indonesian economy booming, an aggressive export pricing policy by Krakatau and its own increased demands for hot coil, Indonesia's exports to Japan last year slumped by two thirds"

However, a Daewoo official in Seoul confirmed that about 12 months ago there had been discussions between Wazai and the South Korean companies and that, so far as he knew, the plan was still on track. But then Daewoo has a strong reason for keeping the deal alive.

> "Daewoo is waiting with bated breath for Posco to wrap up final details concerning its 700,000 tpy cold rolling venture in Malaysia so that the trader can start formal negotiations to build a joint-venture coil centre to treat the plant's output"

At the moment almost all Posco steel exports to Japan are channeled through rival Korean trader Hyosung, and the best that Daewoo has been able to handle to date are the few crumbs left over from companies such as Dongkuk Steel (Dongkuk has its own trading company, Dongkuk Steel Industry, and it also operates an office in Tokyo, Ocean Trading, through which some Japan-bound exports are channelled).

By linking up with Posco and Wazai, Daewoo would be in a better position to work with Posco in other markets. For example, Daewoo is waiting with bated breath for Posco to wrap up final details concerning its 700,000 tpy cold rolling venture in Malaysia so that the trader can start formal negotiations to build a joint-venture coil centre to treat the cold rolling plant's output.

But the Posco factor can present other difficulties. Although nobody anywhere will confirm it, it is common knowledge that every quarter officials from Posco and Nippon Steel (the latter represents the Japanese majors) meet in either Tokyo or Seoul to discuss coming quarter export prices (to Japan and elsewhere) and quantities. Similar talks are held between the Japanese and China Steel. Years ago, Siderbras was also apparently included in this open secret agreement.

That such "understandings" exist between the Japanese mills and Japan's largest steel suppliers makes a mockery of both Miti's oblique references to a steel import threat and the Japanese mills' own grumblings about import penetration. Although both Posco and CSC have their own marketing policies, what they agree to is essentially a commitment to "orderly marketing" in Japan.

In the past, should the South Koreans and Taiwanese choose to ignore their "understanding" with Japan's majors, the threat of Japanese mill retaliation — perhaps in the form of a flood of Japanese steel into South Korea and Taiwan, damaging Posco's and CSC's home markets — was no doubt real.

Today, they would see merit in keeping on good terms with the Japanese majors from self-interest rather than fear. For example, in April 1989 when Posco was desperately short of hot coil, it reached an agreement with the Japanese to toll-roll 120,000 tonnes of slab in Japan to ensure its new CR mill continued to receive feeds.

The potential danger here then for Japanese steel importers such as Wazai, Osaka-based Taisei Kogyo and Taisei Tsusho, and Tokyo-based Mitsumune Tsusho (who rely to varying degrees on Posco and CSC) is that they might find their allocations cut as a result of Japanese mill pressure to reduce exports to Japan over a given quarter. Importers claim that they are not aware of tonnage being cut as a result of such domestic pressure on foreign suppliers but it is a moot point whether a full explanation would be made, given the "lost face"

Attachment 12

D-4(a) Nihon Keizai Shimbun - Feb. 11, 1982

According to an announcement made on the 10th by the Japan representatives of Pohang Steel of Korea, that company has decided on a policy of restricting their exports to Japan of hot coil (wide band steel) which has been threatening the foreign and domestic markets of Japan Steel Industry. Restricting to 40% of previous volume or a monthly base of 60,000 tons. The cheap hot coil produced by Pohang had since the fall of last year zoomed to monthly volume of 100,000 tons, which is over half the volume of steel imports, and was irritating the steel industry by influencing the market price at the retail level.

As a result, Nippon Steel and others unofficially requested self-restraint. The industry expects that Pohang Steel's reduction of volume of exports to Japan serves as an aid to the projected raising of steel prices planned by the steel industry for the domestic market.

Since the startup of the No. 2 rolling mill of the Pohang Steel works, annual raw steel production capacity has reached 8,500,000 tons. The production of hot coils has increased. This hot coil has not only flowed into the Southeast Asian market which Japan had all to itself, but it has seized 1/10 of the hot coil consumption in Japan, and influenced the market price ("store sales" -- sold at the judgment of the wholesaler) and has begun to shake the iron control over prices by the large steelmakers. And the unsettling of the market because of these imports was the one obstacle to the raising of steel prices, which Japan's steel industry regarded as its biggest issue. According to an inside source, Pohang agreed in talks with the Japanese to restrict itself to a 180,000 ton base for the three-month period January-March contract amount, or a monthly base of 60,000 tons, and they are thinking of maintaining that level for the rest of the year.

This agreement may be influenced by the reduction of production anticipated in the planned repair of their rolling mill in the near future, but the company explains it as an action made in consideration of maintaining harmony with Japan's makers.

The Pohang Steel Company has a construction plan for a second integrated steel works, beginning in 1985, which would have an annual capacity of 2,700,000 tons as these plans take shape; it is said that they will ask for cooperation of the Japanese makers. This self restraint at the present time is believed to be a measure looking forward to this steel cooperation between Japan and Korea.

Attachment 13

August 3, 1991 The Nikkei Weekly

MITI steel cartel fades, yet stable order intact

But Is It Collusion Or Cooperation?

BY EDMUND KLAMANN
Staff writer

A long-standing institution of Japanese industrial policy — government-set steel production and prices — has officially hit the scrap heap.

The steady collapse of the 33-year-old "open sales system," which long ago lost its original function as a MITI-led cartel in a fledgling industry, highlights how the Ministry of International Trade and Industry's role in the steel industry has changed from orchestrator to overseer of an order it helped create.

But with U.S. pressure for strict Anti-Monopoly Law enforcement in Japan, there are growing questions as to whether this order is based on collusion or mere cooperation.

"Our constitution forbids a military, but we have the Self-Defense Forces," says a top executive of one of Japan's largest steelmakers, explaining the apparent contradiction between Japan's Anti-Monopoly Law and the "adjustments" that maintain stable prices and supplies in the steel industry.

But steel executives stress that MITI's role in that order has changed over the past decade or two.

According to Yoshiro Sasaki, executive vice president of Nippon Steel Corp., the open sales system was used when Japan was weak and had to use its foreign exchange and natural resources sparingly — a period he describes as one of "planned capitalism."

Sasaki chairs the new committee of MITI and steel industry officials formed to replace the old system and its regular Monday meetings. The new group, which also includes representatives from trading companies, users' organizations and the Construction Ministry, will meet once a month to discuss demand forecasts for steel products.

Sasaki also says that, under the new regime, MITI is likely to stop issuing "guidelines" for steel production.

But some industry officials insist that MITI continues to oversee production levels to ensure stability, and that this will not change with the formal abolition of the open sales system.

One executive argues the hand of MITI is apparent in the remarkable stability of the steelmakers' market shares for crude steel.

He cites crude steel production levels at Sumitomo Metal Industries Ltd. and Kawasaki Steel Corp., long-standing rivals for the number three spot among Japan's steelmakers.

Statistics dating back to 1973 show that neither firm's annual crude steel production has ever exceeded the other's by more than 0.36%. In 1977, Kawasaki Steel out-produced Sumitomo by only 1,033 tons — or 0.0085%.

An official at MITI's steel division refused to comment on market share figures, although he denied that the ministry exerts any control over production levels. "The market is stable and there is less need to adjust production than in the past," he says.

Much of that stability can be traced to the MITI-sanctioned merger of Japan's two leading steelmakers in 1970 to form Nippon Steel Corp., the world's largest steelmaker.

Nippon Steel, the undisputed price leader in Japan's steel industry, has recently been the focus of extensive media coverage as it negotiates with Toyota Motor Corp. over prices for galvanized steel sheets.

The steelmaker is leading the call for a 5% hike to cover the cost of galvanizing line investments requested by the automakers. Rising labor costs and interest rates boosted the costs of those investments beyond original estimates.

But the automakers, faced with declining profits, have been reluctant to go along. And as the steelmakers' most important customer, the auto industry appears increasingly likely to resist the price hike pressure — something analysts say is difficult for other steel users.

But despite charges of collusion and cartel-like behavior, steel executives are quick to point out that their industry remains intensely competitive.

For proof, they say, one need only look at their technology — arguably the most advanced in the world — or the international competitiveness of their customers in the auto and electronics industries.

Attachment 14

LEVEL 1 - 37 OF 260 STORIES

The Times

April 9, 1991, Tuesday

SECTION: Business

LENGTH: 499 words

HEADLINE: Brussels looks for tarnished steel

BODY:

For the steel industry, yesterday's confirmation from Brussels that European Commission investigators earlier this year raided British Steel and a clutch of other steel producers over allegations of price-fixing was merely the public airing of a shared secret. But the fact that the steel industry in Britain and the rest of Europe shrugged its shoulders yesterday and claimed that everyone knew that, didn't they? does nothing to play down the potential significance of the EC's move.

Steel prices are still plunging. Order books are still falling. As a result, steel companies are cutting back capacity British Steel among the foremost. Much of the world steel industry is apprehensive about its future, as the recession in Britain, Australia and America depresses the immediate outlook for steel consumption. But that nervousness is still a very long step away from the murky world of price-fixing cartels.

The steel industry, of course, has been here before. In the steel crisis of the Eighties, price-fixing cartels not only existed, but were run by Brussels. They were called quotas, and were part of a raft of emergency measures thought necessary to shore up the industry, including heavy government subsidies to keep loss-makers in business and import protection.

Once many steelmakers had moved back into or towards profit, Sir Leon Brittan, EC competition commissioner, tried manfully last year to scrap the 1952 Treaty of Paris which provides the European steel industry's governing framework. Unfortunately, the combined special interest of steel producers, their trade unions and some member governments proved too strong for him, and he had to pull back.

British Steel too has faced cartel charges before. Last year it was fined about Pounds 35,000 over a cartel case about stainless steel maladroitly brought by the EC, which eventually had to admit in effect partly to sanctioning the very cartel against which it was moving.

While on the face of it that is far from an impressive precedent for the latest action disclosed in Brussels, the embarrassment of the stainless case might be the spur for getting future charges right: officials of the Commission are said to be confident that in this case, they have significant evidence to warrant an investigation. Whether they have remains to be seen.

For the other steel producers, still bound in the robes of nationalisation, proven price-fixing would be bad news not least, if it were then dismantled, for their profits. For British Steel, which has made a good few enemies by what some regard as a holier-than-thou attitude towards cartels since its privatisation,

proven price-fixing would be astonishing. Thwarted in its ambition to get rid of the steel industry's featherbedding arrangements, in investigating these new price-fixing allegations the EC is clearly demonstrating a real intention to put into practice its pious words but sometimes no more than that against possible anti-competitive measures.

TERMS:
Comment

Attachment 15

No C 83/6 Official Journal of the European Communities 24 3 93

Commission communication concerning guidelines relating to production and deliveries of steel products

(93/C 83/05)

1. The steel industry now faces serious difficulties of a cyclical and structural nature The Commission proposes to implement incentives and measures in support of the industry's restructuring initiatives.

2. With regard to the Commission's support measures, on 25 February 1993 the Council approved the establishment of guidelines relating to production and deliveries on the Community market as soon as possible. These measures should pave the way for market stabilization and enable undertakings to obtain the short-term financial resources they need for restructuring purposes.

3. The Commission has therefore decided, as from the second quarter of 1993, to supplement the six-monthly forward programmes drawn up pursuant to Article 46 (2) of the ECSC Treaty with quarterly forecasts for the Community as a whole. These forecasts, drawn up pursuant to Article 46 (1), will relate to production and deliveries within the Community market for the following product categories:

— hot-rolled wide and narrow strip,

— cold-rolled sheet,

— coated sheet and plate,

— quarto sheet and plate and wide flats,

— heavy sections,

— wire rod,

— reinforcing bars,

— merchant bars.

4 Each quarter the forecasts will be set out in a Commission communication published in the *Official Journal of the European Communities* The Commission will invite each undertaking (or group of undertakings belonging to a single decision-making centre) to inform it voluntarily and confidentially of how it intends to comply with the global trends in production and deliveries in the Community market communicated individually for the products in its production range

5 The Commission thus hopes to encourage individual behaviour by undertakings of a kind which is likely to resolve the problems facing the sector. It will endeavour to ensure that neither the preparatory consultations nor the actual individual behaviour of undertakings results in agreements or practices prohibited by the Treaty. It will pay special attention to any anomalies or shortages reported by dealers or consumers

6. This measure will be withdrawn, by means of a notice published in the *Official Journal of the European Communities*, once the Commission has detected an adequate improvement in the steel market situation or if the pre-conditions for the establishment of the steel industry restructuring programmes are not satisfied.

Guidelines relating to production and deliveries of steel products for the second quarter of 1993

(93/C 111/02)

As stated in its communication of 24 March 1993 (¹), in the context of the support measures endorsed by the Council on 25 February 1993, and after carrying out the necessary consultations, the Commission has drawn up global forecasts relating to production and deliveries of steel products in the Community for the second quarter of 1993. Those forecasts are concerned with the product categories of which the list and the definitions are attached.

In general, it was noted that demand for steel continues to fall as a result of a downturn in the economy and short-term economic uncertainty. No consumer industry is escaping the prevailing gloom and some sectors are currently facing major problems. The continuing run-down of stocks is an additional element underlining the drop in demand, indeed a major factor for certain products. At present, the only stimulus comes from exceptionally high demand from the Far East, in particular China, but it remains insufficient to turn around the negative trend detected in category Ib products (cold reduced sheet), given the absence of market openings in eastern European countries (ex-USSR in particular) and difficulties on other traditional markets such as the USA.

The main consumer industries for flat products, namely steel tube manufacturer, shipbuilding, construction and the automotive industry, are all experiencing at present a marked slowdown in their activity. The products most affected by this are hot coils (category Ia) and to a greater extent cold reduced sheet (category Ib), both of which are affected not only by shrinking demand but also by the continuing movement from bare to coated sheet.

As regards long products, demand is much more varied among the different Member States, with a halt to the decline in the United Kingdom but a worsening of the situation in Spain and Italy in particular, where the construction sector, a major consumer of long products, is currently undergoing a marked reduction in activity. The situation is reflected in particular in rebars (category V), production of which is exclusively intended for this sector, unlike the situation for wire rod (category IV) and merchant bars (category VI), which are finding openings in other sectors. Only export prospects, in comparison with the corresponding period in 1992, are limiting the greatly improved fall in production of these products.

For the second quarter of 1993, the guidelines adopted for the various categories of products are those shown in the tables below.

(¹) OJ No C 83, 24. 3. 1993.

Production

(1 000 tonnes)

Category of products (¹)	Actual figures Quarter				Forecasts II/1993	
	I/1992	II/1992	III/1992	IV/1992	tonnes	Variation in relation to II/1992 %
Ia	6 015	5 782	4 848	4 823	5 145	− 11
Ib	3 740	3 472	3 197	2 847	2 775	− 20
Ic	3 217	3 180	2 935	2 786	2 885	− 9
II	1 531	1 503	1 415	1 403	1 430	− 5
III	1 676	1 739	1 377	1 500	1 635	− 6
IV	3 865	4 024	3 354	NA	4 025	0
V	3 281	3 622	3 002	NA	3 440	− 5
VI	2 714	2 746	2 153	NA	2 610	− 5

(¹) Definition in the attached list.

Deliveries in the Community

(1 000 tonnes)

Category of products (1)	Actual figures Quarter				Forecasts II/1993	
	I/1992	II/1992	III/1992	IV/1992	tonnes	Variation in relation to II/1992 %
Ia	5 076	4 945	4 116	3 879	4 080	— 17,5
Ib	2 869	2 789	2 224	2 312	2 230	— 20
Ic	2 910	2 784	2 345	2 518	2 505	— 10
II	1 243	1 180	947	980	1 035	— 12,5
III	1 327	1 280	1 163	1 223	1 090	— 15
IV	3 583	3 553	2 848	NA	3 285	— 7,5
V	2 934	3 106	2 736	NA	2 720	— 12,5
VI	2 541	2 434	1 913	NA	2 250	— 7,5

(1) Definition in the attached list

List of product categories covered by Article 46, ECSC Treaty guidelines (1)

Category Ia: Hot wide and narrow strip including:

— hot-rolled wide strip for direct use and for export,

— hot-rolled narrow strip less than 600 mm including tube strip,

— plate of 3 mm and over obtained by cutting wide strip.

Category Ib: Cold-reduced sheet:

— cold-reduced sheet including hot-rolled sheet of less than 3 mm obtained by cutting wide strip excluding material destined to be coated in the Community.

Category Ic: Coated products other than tinplate:

— sheet coated with metal by hot dipping or electrolysis and sheet coated by other organic or inorganic materials.

Category II: Quarto plate and wide flats, excluding semis of a diameter greater than 406,4 mm for Community production of tubes.

Category III: Heavy sections excluding mine frame sections, sheet piling and railway material.

Category IV: Wire rod in coil, including rebar and merchant bar in coil, as well as products for the production of welded mesh in the Community.

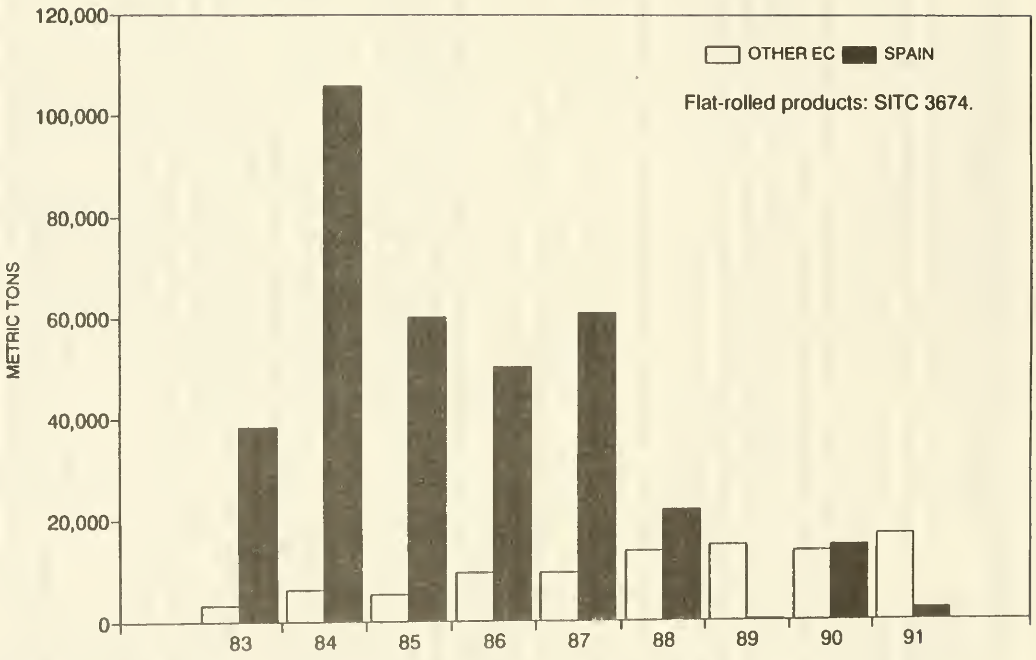
Category V: Rebars excluding rebars in coil.

Category VI: Merchant bars excluding merchant bar in coil.

(1) Categories IV, V and VI include commercial and special steels. The other categories relate only to commercial steels as well as certain lightly alloyed steels for construction.

Attachment 16

SPAIN'S EXPORTS TO JAPAN COMPARED TO OTHER EC EXPORTERS'



Source: UN Trade Statistics.

Mr. BROOKS. Mr. Constantine.

STATEMENT OF LLOYD CONSTANTINE, PROFESSOR OF LAW, FORDHAM UNIVERSITY, NEW YORK, NY

Mr. CONSTANTINE. Chairman Brooks, members of the subcommittee, Mr. Fish, I thank you for this opportunity. I am an antitrust lawyer and a partner at the firm of McDermott, Will & Emery, and I teach antitrust law, as you have noted.

In my former life, I was chairman of the Antitrust Task Force of the National Association of Attorneys General. In that capacity, I acted as lead counsel in many multiple State cases including the successful price-fixing actions instituted against several Japanese electonics companies by all 50 States, and as New York's lead counsel in the *Hartford Insurance* case won by 19 States last term in the U.S. Supreme Court.

Similar to the claims of the American steel industry, the Hartford case involves claims that actions by a foreign cartel have had disastrous effects on an American industry and the American economy.

And I was struck by Mr. Howell's testimony. The crux of the *Hartford* case was also a cartel arrangement centered in London, England.

Today's hearing focuses on well-publicized allegations by the U.S. steel industry, concerning the so-called East of Burma Agreement. The parties to the agreement have allegedly dumped billions of dollars worth of steel in the United States and greatly injured the U.S. steel industry.

I am in no position to assess the validity of these factual assertions. What I can do as an antitrust lawyer is try to tell the committee what, if any, remedy there is or should be in U.S. antitrust laws for conduct of the kind alleged by the steel industry.

The U.S. steel industry has instituted an antidumping case. Without intending to denigrate the role of antidumping laws, I believe the U.S. industry, and more important, the American economy, would benefit more if the remedy for such conduct was firmly grounded in the basic laws relating to competition, the antitrust laws.

The facts alleged by the steel industry are typical of a competition problem which should be addressed according to the legal and economic principles provided by competition law. The East of Burma Agreement is a garden variety market allocation scheme. It is just a big one. The restriction of sales, when coupled with producer overcapacity, provides the economic rationale to dump into an open market, the United States.

If the antidumping case is successful, the duties are not awarded to the injured American companies but to the Government. The American consumer can then get hurt twice. First when the foreign producers prices are raised by inclusion of the dumping duties and a second time when the American producer raises its prices to recover its dumping injury.

Worst of all, the once open American market has now been at least partially perverted by the pricing consequences of the dumping proceeding. The antitrust laws, while not perfect, should provide a much more straightforward remedy, one better suited to ad-

dress a competitive distortion without further distorting the marketplace.

First of all, in an antitrust case, the injured party, not the Government, is awarded the treble damages. The injured plaintiff does not have to turn to the American consumer to recoup the losses suffered from unfair foreign competition. The American marketplace remains open.

Why hasn't the U.S. steel industry availed itself of the superior remedy of antitrust law? Neither the steel industry nor many other severely damaged American industries have used the antitrust sword because of serious gaps in the U.S. antitrust law.

First, it is frequently asserted that a plaintiff suing under U.S. antitrust law cannot recover antitrust damages based solely on an alleged cartelization of a foreign market. This doctrine, which the Supreme Court applied to the decimated U.S. consumer electronics industry in the 1986 *Matsushita* case, is equally applicable to the steel industry.

These industries have no antitrust standing to complain about agreements such as East of Burma which is, in effect, the cartelization of a foreign market. The steel industry would argue, however, that it was asserting injury resulting from the sale of steel at an unfairly low price in the United States. But under antitrust law, for a price to be unfairly low, it must be predatory; and to be predatory, it must be below cost. And the Supreme Court has never defined the cost basis which prices must fall below to be predatory. In fact, the Court has declined to so on numerous occasions.

And to further complicate matters, the Supreme Court has stated that pricing below cost is not sufficient to prove a case of predatory pricing. The plaintiff must also demonstrate that there is a plausible scenario for the predators to recover the profits they have lost through below-cost pricing.

In the steel industry, this would mean that the U.S. industry would have to demonstrate how the foreign producers would recover the profits lost during the period of predation, presumably in their home markets.

Why have the courts evolved a price predation doctrine which makes it extraordinarily difficult, if not impossible for an injured party to prevail? They have bought the big fallacy often stated by foreign steel producers and other foreign industries charged with dumping and predatory pricing, that such pricing practices benefit American consumers and only hurt foreign consumers.

And although it is common to see, as I frequently do on New York City's 47th Street, Asian tourists queued up to buy Asian optical and consumer electronics products, these are merely the short-term effects of international predation.

Over the long haul, American firms shut out of the foreign trading partners market, begin the inexorable process of shifting production offshore, sourcing their products from foreign producers and eventually abandoning the market altogether.

At that point, the foreign manufacturers begin to recapture the losses not already recovered in the home market by a variety of mechanisms. They extend price fixing and market allocation agreements from the domestic cartel into the foreign market with virtual impunity since foreign soil, distance, and often the complicity of

their own government prevent effective enforcement of the U.S. antitrust laws. They extend the dominance of the target markets into succeeding generations of products from complementary technologies, and they can buy the remains of the battered American competitors at distress prices. The American workers who lose decent paying jobs in the targeted industry often wind up unemployed.

The alleged benefits to American consumers of predatory and discriminatory pricing are ephemeral, and they are heavily overwhelmed by their corrosive effect on the American economy as a whole. There is a simple solution to this gap in antitrust law.

Senator Metzenbaum has sponsored S. 99, the International Fair Competition Act which would substantially address the problem. A similar bill, H.R. 5348, sponsored by Congressman Fish and Congressman Bryant, directly confronts predatory and discriminatory pricing by trading partners with closed or trade restrained markets, the very situation alleged to exist in the steel industry.

These bills would authorize private treble damage actions on behalf of persons injured in their business or property by virtue of the sale in the United States of articles below their average total cost when the plaintiff can establish that the articles are exported from a foreign country whose market is closed or noncompetitive.

In the international trading context, these bills would codify and set forth specific elements for the antitrust offense of predatory pricing and finally define a specific cost basis for a predatory pricing violation.

These proposals accept the premise that open competition and free markets produce high quality goods at low prices and encourage technological innovation. They support and intend to foster enactment of strong competition laws by our trading partners. Firms operating from markets which have effective price competition and which are open to foreign competitors from the United States, unlike the allegedly cartelized markets of the parties to the East of Burma Agreement, have no exposure under the proposals.

A U.S. firm with effective access to a foreign competitive market has no cause of action, no shield for inefficiency, and no sword to combat legitimate foreign price competition.

Countries exporting goods into the United States are given strong incentives to open their markets and to foster effective price competition.

S. 99 and H.R. 5348 are not perfect. They have flaws, which can easily be remedied and which I have addressed in testimony before the Judiciary Committee in the Senate. I believe that an antitrust remedy for predatory or discriminatory low pricing emanating from cartelized foreign markets is the way to go.

There is another gap in the law worth noting. Under the doctrine of Foreign Sovereign Compulsion, a clear antitrust violation can be immunized if the violator can establish that his action was compelled or directed by a foreign state.

In clear cases of compulsion, the doctrine may make sense, avoiding a clash of U.S. courts with foreign access states. However, the doctrine is susceptible to manipulation and has been frequently abused by our trading partners.

The issue is now arising in three major private antitrust cases in the potash, soft wood, and glass industries. The issue also arose in the slightly different guise of international comity in the *Hartford Insurance* case, which I referred to before. By five to four, the Supreme Court sustained U.S. jurisdiction over foreign cartel conduct claimed by both the defendants and "Her Majesty" to be inconsistent with, if not compelled by, British law.

Legislation is needed to codify sound principles for the exercise of jurisdiction in the face of comity arguments, to clearly separate the issues of comity and foreign sovereign compulsion, and to clarify when the compulsion defense should be available.

I note that Chairman Brooks has been concerned about these issues for many years, and I hope that his concern will result in the enactment of legislation in the near future.

Thank you for this opportunity.

Mr. BROOKS. Thank you very much.

[The prepared statement of Mr. Constantine follows:]

PREPARED STATEMENT OF LLOYD CONSTANTINE, PROFESSOR OF LAW, FORDHAM UNIVERSITY, NEW YORK, NY

Chairman Brooks and members of the Committee. Thank you for this opportunity to testify concerning "International Competition In The Steel Industry".

Although I testify today only for myself, I will note my background. I am a member of the firm McDermott, Will & Emery, concentrating my practice in antitrust. I also teach Antitrust Law at Fordham Law School. For ten years ending in 1991 I was New York State's chief antitrust enforcement official, and from 1985 to 1989 coordinated antitrust enforcement for all fifty state attorneys general as Chairman of the Antitrust Task Force of the National Association of Attorneys General. In that capacity I acted as lead counsel in many multiple state cases, including the successful price-fixing actions instituted against several Japanese electronics companies by 37, 49 and 50 states respectively, and as New York's counsel in the Hartford Insurance case won by 19 states last term in the United States Supreme Court. 113 S.Ct 2891 (1993). Similar to the claims of the American Steel industry, the *Hartford* case involves claims that actions by a foreign cartel have had disastrous effects on an American industry and the American economy.

Today's hearing focuses on well publicized allegations by the United States Steel Industry, that major steel producing nations in Europe and Asia have entered into a global market allocation referred to as the "East of Burma" agreement. It is alleged that Asian steel producers have agreed to severely restrict their steel exports west of a line through Myanmar (formerly Burma) and that European steel producers have in turn agreed to severely restrict their sales east of this line. Sales to the United States are allegedly not allocated in this agreement. Consequently, it is alleged that the United States serves as a dumping ground (a sort of "free fire zone") for the production overcapacity of the nations which are a party to this agreement. The parties to the agreement have allegedly dumped billions of dollars worth of steel in the U.S. and greatly injured the U.S. steel industry.

I am in no position to assess the validity of these factual assertions. What I can do as an antitrust litigator, antitrust teacher and former government prosecutor, is try to tell the Committee what if any remedy there is or should be in U.S. antitrust law for conduct of the kind alleged in the steel industry.

The U.S. steel industry has instituted an anti-dumping case before the Commerce Department and the International Trade Commission. Without intending to denigrate the role of anti-dumping laws, I believe the U.S. industry, and more important, the American economy as a whole, would benefit more if the remedy for such conduct was firmly grounded in the basic laws relating to competition, the antitrust laws.

The facts alleged by the steel industry are typical of a competition problem which should be addressed according to the legal and economic principles, as well as the remedies, provided by antitrust law.

The alleged "East of Burma agreement is a garden variety market allocation scheme. "I will restrict my sales in your territory in return for an equivalent favor." The restriction of sales, when coupled with producer overcapacity, provides the economic rationale, if not the necessity, to dump into an open market, the United

States. If the anti-dumping case is successful, the duties are not awarded to the injured American companies but to the government. The American consumer can then get hurt twice. First when the foreign producers prices are raised by inclusion of the dumping duties and a second time when the American producer raises its prices to recover its dumping injury. Worst of all the once open American market has now been at least partially perverted by the pricing consequences of the dumping proceeding.

The antitrust laws, while not perfect, should provide a much more straight forward remedy, one grounded in competition principles and better suited to address a competitive distortion without further distorting the marketplace.

First of all, in an antitrust case the injured party (not the government) is awarded the damages. Treble damages serve the various functions of punishment, filling the gap between actual and provable damages, and deterring future illegal behavior. The injured plaintiff does not have to turn to the American consumer to recoup the losses suffered from unfair foreign competition. The American marketplace remains open.

Why hasn't the U.S. Steel industry availed itself of the superior remedy of antitrust law? Putting on the hat of an antitrust historian, I know that steel and antitrust have more than a nodding acquaintance. Neither the steel industry nor many other severely damaged American industries have used the antitrust sword because of serious gaps in U.S. antitrust law.

First, it is frequently asserted that a plaintiff suing under United States antitrust law "cannot recover antitrust damages based solely on an alleged cartelization of [a foreign] market, because American antitrust laws do not regulate the competitive conditions of other nation's economies." *Matshshita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 (1986). Under this doctrine, which the Supreme Court applied to the decimated U.S. consumer electronics industry in the 1986 *Matshshita* case, but is equally applicable to steel, the industry has no antitrust standing to complain about "East of Burma" which is in effect the cartelization of foreign markets.

The industry would argue, however, that it was not asserting the injury to foreign consumers in foreign cartelized markets, but our injury resulting from the sale of steel at an unfairly low price in the U.S. But under antitrust law, for a price to be unfairly low, it must be predatory and to be predatory it must be below cost. The Supreme Court has never defined the cost basis which prices must fall below to be predatory. In fact, the Court has specifically refused to do this on numerous occasions, most recently last June, in its decision of *Brooke Group Ltd.* v. *Brown & Williamson* 113 Sup. Ct. 2578 (1993). In this vacuum the thirteen federal Courts of Appeal have fashioned numerous divergent costs bases for triggering the below cost pricing element of a predatory pricing case. To further complicate matters, the Supreme Court has stated that pricing below cost, assuming an appropriate cost basis, is not sufficient to prove a case of predatory pricing in violation of the Sherman Act. The plaintiff must also demonstrate that there is a plausible scenario for the predators to recover the profits they have lost through below cost pricing. In the steel industry this would mean that the U.S. industry would have to demonstrate how the foreign producers would recover the profits lost during the period of cost predation, presumably in their domestic markets. Why have the Courts evolved a price predation doctrine which makes it extraordinarily difficult if not impossible for an injured competitor to prevail in a predatory pricing case? The big fallacy, often stated by foreign steel producers and other foreign industries charged with dumping and predatory pricing, is that such pricing practices benefit American consumers and only hurt foreign consumers. And although it is common to see, as I frequently do on New York City's 47th Street, Asian tourists queued up to buy Asian optical and consumer electronics products, these are merely the short term effects of international predation and discrimination. Over the long haul, American firms shut out of the trading partners market begin the inexorable process of shifting production offshore or sourcing their products from foreign producers, and eventually abandoning the market altogether. At that point, the foreign manufacturers begin to recapture the losses not already recouped by supracompetive pricing in the home market, through a variety of mechanisms. They may extend price-fixing and market allocation agreements from their domestic cartel into the foreign market with virtual impunity, since foreign soil, distance and often the complicity of their own government prevent effective enforcement of the U.S. antitrust laws in relation to such activities. They can extend their dominance of the target market into succeeding generations of products and complementary technologies. They can buy the remains of the battered American competitors at distress prices. The American workers who lose decent paying jobs in the targeted industry often wind up unemployed or relegated to lower paying jobs.

The alleged benefits to American consumers of predatory and discriminatory low pricing are ephemeral and heavily overwhelmed by their corrosive effect on the American economy as a whole.

There is a relatively simple and straight forward solution to the gap in antitrust law which in turn is the result of three judicial failures; i.e., the failure to recognize the relationship between anticompetitive activity abroad and anticompetitive effects in the U.S. in an increasingly globalized marketplace, the failure to once and for all define a specific cost basis in predatory pricing cases; and the failure of the Courts to see the obvious fallacy in the assertion that predatory pricing by foreign companies almost always helps U.S. consumers.

I have advocated a legislative solution to this gap in the law for years. In 1990, at the request of Senators Bryan and Gorton, I drafted and submitted a bill to correct the problem. Senator Metzenbaum has sponsored legislation, S. 99, "The International Fair Competition Act" which would substantially address the problem. That bill directly confronts predatory and discriminatory pricing by trading partners with closed and/or trade restrained markets, the very situation alleged to exist in the steel industry. Special rules and standards dealing with price predation and discrimination in the international context are necessary, because the likelihood of such conduct and its effects are far greater in the international trading context than in relation to purely domestic competition. S. 99 would enact a hybrid antitrust/anti-dumping law by amending the dormant private treble damage provision of the 1916 Act, 15 U.S.C. 72. The Act would authorize private treble damage actions on behalf of persons injured in their business or property by virtue of the sale, or export for sale, in the United States of articles below their average total cost, but only when the plaintiff can establish the existence of two other requirements. The articles must be exported from a foreign country whose market in the articles is non-competitive or closed to effective international competition and the below cost sales must be anticompetitive in the United States (within the meaning of the Clayton Act) or must destroy, injure or prevent establishment of a line of commerce in the United States (within the meaning of current anti-dumping laws).

In the international trading context, the Act would codify and set forth specific elements for the antitrust offense of predatory pricing. The Act would also finally define a specific cost basis for a predatory pricing violation.

S. 99 accepts the premise that open competition and free markets produce high quality goods at low prices and encourage technological innovation. The Act supports and intends to foster enactment and vigorous enforcement of strong competition laws by our foreign trading partners. Such actions would preclude successful enforcement of the Act by its very terms.

The Act also accepts the premise that for pricing to be truly predatory, rather than just legitimate competitive low pricing, it must fall below the producer's cost.

This legislative proposal assumes that in the "long run," producers must cover both fixed and variable costs to break even, let alone operate profitably. A producer operating from a foreign market which is either closed to international competition or non-competitive, because it is cartelized or monopolized and no *effective* regime of domestic antitrust enforcement exists, can cover fixed costs in the home market and sell below cost in foreign markets for as long as such conditions prevail. The United States producers faced with such pricing behavior cannot, by definition, respond in kind in the closed or trade restrained foreign market, nor can they subsidize below cost sales in any foreign market with sales made in the United States. Both the vigorous antitrust enforcement regime in the United States and the fiercely competitive marketplace it has fostered, would preclude such a result. Faced with this economic reality, American firms will inevitably be driven from the market by sustained below cost sales subsidized by sales at supracompetitive prices in the closed and/or non-competitive foreign market.

Firms operating from markets which have effective price competition and which are open to foreign competitors (unlike the allegedly cartelized markets of the parties to the "East of Burma" agreement) have no exposure under the proposed Act. This is the case regardless of whether their prices in the United States are below cost. This remains the case even when such below cost sales result in injury to competition (within the meaning of the Clayton Act) and/or destruction of United States competitors. Under the Act, a United States firm with effective access to a foreign competitive market simply has no cause of action, no shield for inefficiency and no sword to combat foreign price competition, even when foreign competitors act with predatory intent.

The Act has two clear legislative objectives. Countries exporting goods into the United States are given strong incentives to open their markets to foreign competitors and to foster effective price competition, through the adoption and enforcement of strong competition laws. The merit of these objectives is hardly worth debating.

They are the basis of every major trade and international antitrust initiative which the United States has pursued over the last several decades. These objectives are the basis of the much publicized Structural Impediments Initiatives ("SII") involving the Japanese and United States governments. Similarly, the lowering of trade barriers is the overall objective of the GATT.

S. 99 is not perfect, it has flaws which I have addressed in testimony before the Judiciary Committee in the Senate. However, I believe the overall approach of that proposal and of an antitrust remedy for predatory or discriminatory low pricing, emanating from cartelized foreign markets, is far superior to the remedies afforded by our current anti-dumping laws.

There is one final flaw or gap in the law relevant to these issues worth noting. Under the doctrine of "foreign sovereign compulsion" a clear antitrust violation can be immunized if the violator establishes that his action was directed or compelled by a foreign state. In clear cases of compulsion the doctrine may make sense, avoiding a clash of U.S. courts with foreign acts of state. However, the doctrine is susceptible to manipulation and has frequently been abused by our trading partners. The issue is now arising in three major private antitrust cases in the potash, soft wood and glass industries. The issue also arose in the slightly different guise of "international comity" in the *Hartford* insurance case recently decided by a narrow 5 to 4 margin. The Court sustained U.S. jurisdiction over foreign cartel conduct claimed by both the defendants and the Government of the United Kingdom to be consistent with, if not compelled by, British law. Legislation is needed to codify sound principles for the exercise of jurisdiction in the face of comity arguments, to clearly separate the issues of comity and foreign sovereign compulsion and to clarify when that defense should be available. I note that Chairman Brooks has been concerned about these issues for years and hope that his concerns will result in a sound legislative proposal in the near future.

Thank you.

Mr. BROOKS. Mr. Usher, as president of a steel company that has had significant experience as an exporter, what are some of the trade barriers that have you encountered in foreign markets?

Mr. USHER. We have exported a lot. We have exported up to 12 percent of our production over the last several years.

One of the things that I have found very interesting is that we sell to Japanese transplant auto companies in this country. We sell them fenders, and we sell them doors.

In trips to Japan, I have learned that the Japanese auto companies in Japan are paying several hundred more dollars per ton than the product we are selling in the United States. It is the same fender, the same door, the same roof. Our ability to sell in Japan just doesn't happen. There is always some reason or some qualification that those happen to make that sale happen.

And it is not unique to U.S. steel. There is no domestic steel company that is able to sell to these Japanese car companies. We all sell to them here. We sell them the same product, and we sell it at a substantially low price.

We could put that steel on an airplane and send it over and still make money if they would buy it. It doesn't happen. There are numerous regulations and it just never gets done. We see this in other places throughout the world. You would think that the laws of economics would decide how steel is traded. It doesn't happen.

Mr. BROOKS. You would be interested in a proposal I had some years ago to refine the tariff arrangements for entry of Japanese cars into our market. My proposal was that all the Japanese cars to be sold in this country be imported through the city of Galveston, a great port in my district. We could park them on the beach. And we could have two people working day and night checking them out. And by the time they would have finished inspecting them, they would have been exposed to salty air, a high tide or

two; and they would have been qualified, and they would meet our restrictions and specifications as to worthiness.

Mr. USHER. Two good high tides.

Mr. BROOKS. The State Department is involved too much in our trade practices. We have to make a distinction between what is good for our State Department in our international negotiations and what is good for our businesses and our industries. And they are very different.

Mr. Howell, you have in your possession some very explosive documents suggesting cartel activity and "gentlemen's agreements"—you used the word loosely—among Japanese and European steel mills to control trade in their two regions.

How has this foreign cartel responded to steelmakers who won't go along with the East of Burma Agreement?

Mr. HOWELL. Well there are really two answers. One is: What do they do to their own members who don't toe the line; and what do they do to others outside of that agreement?

We understand that there is a penalty if you overship your quota. If the Europeans sold more to the Japanese sphere, one penalty is dumping twice the tonnage in the least convenient place and least convenient time.

And another penalty is a "penalty account" that the members establish in a Swiss bank. They all pay dues, if you will, into that account. If there is an arbitration of the cartel that decides that somebody has violated the terms of it, they have a penalty deducted from that account.

We heard a story from a Japanese trading company that had brought a shipment from Europe to Japan. This would have been a violation of the East of Burma Agreement. The German mill did this secretly. They invoiced it to India, but it was actually destined for Japan. And Nippon Steel found out about it.

The German mill unloaded the boat in Bremen, paid the Japanese trading company for the cost of the charter of the vessel and a penalty clause saying that "it is cheaper to pay you off and kill the deal than to pay the penalty that we would have to suffer under the cartel."

As to nonmembers, we heard of a Japanese steel mill that shipped some structural shapes to the U.K. They got a call from a British mill saying, essentially, "What are you doing? This is a violation of the agreement."

The Japanese executive said, "I don't know what you are talking about; I don't know about any agreement." And soon after that, the British mill began dumping the same product in the Japanese market.

These are the kinds of ways—and there are other stories like that that I would be happy to furnish you names on. But we understand that at the Marbella meeting in Spain, several Japanese mills made complaints against German mills about sales that they were making in China. I don't know what the outcome of that will be.

Mr. BROOKS. We have a vote on the Penny amendment to the DOD bill. I think we will recess, come back; and I have a couple of more questions for you gentlemen. Then we will proceed with everybody else's questions. It is critical, and we appreciate your being

here. I am almost shocked by the conviction you have and obvious facts about how we let a major American industry just get rolled by every foreign cartel that can dream up a little coalition to dump in our markets.

So we will recess until after this vote and come back.

[Recess.]

Mr. BROOKS. The subcommittee will come to order.

Professor Constantine, do you agree with those who assert that the antitrust laws are inherently unworkable in the international arena, not only because of evidentiary problems but because they intrude on sensitive international relations?

Mr. CONSTANTINE. Mr. Chairman, I don't think the antitrust laws are inherently unworkable. I think during the period of the 1980's a period of lax enforcement, nonenforcement, and antienforcement rhetoric emanating from the administrations of President Bush and President Reagan, the antitrust laws which had once been a very, very strong enforcement tool were sapped of much of their vitality.

I think that under the leadership of the Clinton administration and Anne Bingaman, who is the head of the Antitrust Division, I think that the antitrust laws can regain their vitality and serve their original purpose.

It is somewhat more difficult to deal with cases involving foreign trading partners and companies abroad. There are evidentiary problems. There are problems of getting evidence abroad. There have been "blocking statutes" passed by foreign countries that stifle investigations. There are also so-called claw back statutes, which have the same effect.

But I think the world is actually coming around to antitrust—antitrust was an American idea, but the European Community has adopted strict antitrust laws. It is said—and I think with some validity—that some transactions, at least for a time, would have been dealt with much more strictly from an antitrust standpoint under the European law than under the American antitrust law, which is an interesting situation, historically—but as the world starts to come around to antitrust, which has happened in Europe and is very, very slowly happening in Asia as well, I think that the prevalence of blocking statutes and claw back statutes and all of that will cease to some extent.

And I think that there is no insuperable barrier to the enforcement of antitrust law. What you really need are government enforcement agencies who are dedicated and devoted to the task and who believe in competition law and who believe in antitrust law. And you need some slight legislative amendments similar to the ones that I have noted in my direct testimony.

Mr. BROOKS. Mr. Howell, is there empirical evidence to support your view that the foreign steel companies deliberately underprice their steel at the expense of the U.S. industry and not simply as a natural reaction to fluctuations in market demand?

Mr. HOWELL. Mr. Chairman, in the antidumping cases that were brought this year, the Commerce Department amassed a huge amount of empirical evidence. They went out and got the foreign transaction prices showing what the foreign market price and was also what the price was in the U.S. domestic market. And so they

have very good evidence what the pricing was. And they found there was a great differential, a differential reflected in the dumping margin, in most cases more than 20 percent. That is a large differential.

The view is—our belief is that you could not have a differential that wide without the existence of market barriers and anticompetitive practices in the foreign markets. Japan and the EC and some of the other markets have been high-priced islands where competition just doesn't work very well, much of which we have documented as a matter of public record; and they have priced whatever they have had to price in order to get the business externally. And that differential is a reflection of the existence of those arrangements abroad.

Mr. BROOKS. Professor Constantine, at what point should foreign government involvement in or direction of an anticompetitive arrangement involving private companies shield those companies from antitrust liability?

Mr. CONSTANTINE. Mr. Chairman, I think that when the action is compelled and clearly compelled by a foreign government, then maybe immunity should apply. I don't think that mere direction should be enough. And I think most importantly it is an issue of fact in each discrete case.

In many cases that I have been aware of or been involved in, the issue was treated as one of law. I think it is an issue of fact. You have to find out with whether in fact the conduct was actually compelled by a foreign government. That is similar to the test that we apply to our own States under the doctrine of State Action Sovereign Immunity.

So I think the doctrine is much manipulated and abused. I think it must be treated as a factual issue and only compulsion, not that "we sort of like you to do this" or "it is sympathetic to our body of law." That is what we found in our insurance case. Her Majesty's brief saying "this is consistent with our notions of law in the U.K." That is not enough. It has to be an actual compulsion.

Mr. BROOKS. Mr. Bozzone, some observers say that much steel is imported into the United States simply because American firms are unable to produce certain special grades and qualities of the product.

How do you respond to that?

Mr. BOZZONE. Well, Mr. Chairman, my company exports about 12 percent of its production. We export to 34 different countries. We supply specialty steel requirements around the world. And I am not aware of any grades of steel that we do not produce that have to be imported into our marketplace.

We have had a consistent record of meeting quality standards around the world. So, therefore, I would have to assume that the quality that we produce is adequate for our manufacturers as well as those manufacturers in other countries. It is not a quality issue. It is not an availability issue. It is price and unfair subsidization by these other governments of their steel companies.

Mr. BROOKS. I know you have more people competing with you than anybody else. You have Sweden and Brazil. You have six or eight countries. They like that quality steel business, right?

Mr. BOZZONE. We have quite a few. The specialty steel industry around the world tends to be the higher margin portion of the steel business. And as a result, that is where the dollars are and that is where competition tends to flow.

So we have a tough job, but we have remained very competitive in both the cost arena and also the quality arena, and that is basically where the product is sold.

Mr. BROOKS. Mr. Fish, the gentleman from New York.

Mr. FISH. Mr. Usher, I will start with you. The opponents to the position taken by your company and the other petitioners in the recent Commerce and ITC proceedings deny the existence of foreign cartels and play down the market share of foreigners in the U.S. domestic market.

They claim that the underlying purpose of the petitioners with regard to these filings is to completely exclude foreign competition in the U.S. domestic markets due to increased competition from several relatively new minimills.

Do you care to respond to these arguments?

Mr. USHER. I have heard these arguments, and I also reject them. In these cases, when they talk about new competitors in this country that we are afraid of, they are really talking about one company, Nucor. And Nucor has a capacity of about 1.6 million tons in a market that ranges between 45 and 50 million tons.

So I would say first of all they are a rather insignificant player in this market.

The second thing I would say is that we have no problem with Nucor. Nucor operates under the same rules that we do. They have to make it in the marketplace. They have to be able to attract private capital, and we welcome that competition.

In terms of the cost structure between a company like United States Steel and Nucor, we produce a far wider range of products. We have relatively small overlap between the products that we produce and the products that Nucor produces.

We sell to the automobile people. We sell to appliance people. We sell to people that make computer cabinetry. We do not see Nucor as a competitor in many of these businesses.

Nucor has an advantage on us during times in which the domestic steel industry is weak because their principal cost is made up of scrap. And when the domestic steel industry is weak, scrap prices fall. I think you have seen, if you followed this over the last year, that as the domestic industry's business has improved, the cost of scrap has gone up considerably; and Nucor does not have the competitive advantage they may have had 2 years ago.

So this competitive advantage will wax and wane depending on price of scrap. We have costs that a company like Nucor does not have because for every employee we have, we have five retirees; we are paying part of the health care cost of those retirees; and we are sending a pension check to that retiree every month. This is part of the downsizing that we had to do to be competitive on a world scale. We accept that. We feel that we can go head to head with a company like Nucor in terms of cost and quality.

Mr. FISH. Thank you.

Mr. Usher, there was another issue that was generally alluded to in an answer that you gave to the chairman. I would like to return to it.

Part of the theory that foreign cartels exist to protect foreign markets, and dump excess capacity into U.S. markets, is the argument that U.S. producers are unable to export to foreign markets due to these cartels. Some have suggested that one of the reasons that the United States is unable to export into the Japanese market is that the Japanese market has become a customer-to-customer driven market within Japan; and, two, that U.S. steel companies are not able to produce steel as clean or flat as that produced in the Japanese mills.

Would you like to respond to these arguments and tell us why you think U.S. companies are having difficulty exporting into markets of some of our foreign competitors.

Mr. USHER. Again, we have exported into these markets, and I think there is a relationship between the producer and the customer, as we have in this country, but we also have with our foreign customers.

I think the principal thing is that the United States is the only industrialized country in the world that does not have an excess of steel capacity. We can take care of our market and, really, we need imports into this market to do so. We don't have enough capacity in this market to take care of the market demand.

Every other country has an excess of capacity. They satisfy their demand. They look around the world to see where they want to bring the steel, and they bring it into the United States. Much of it has been documented unfairly.

So the key is, do we want to go out and establish a customer base in Japan when really there is a need for steel companies to satisfy the customers in this country? We are much better, I think, directed toward taking care of those needs around here.

As far as this issue of flatness or cleanliness, I would reject that entirely. We sell to customers that buy throughout the world. They keep detailed records on quality, e.g., how does U.S. steel measure against Japanese steel or German steel or British steel; and they share with us the reject rates, the quality ratings. And any company that keeps these types of detailed statistics, whether it be Ford Motor or Shell Oil, we always come up as very, very competitive with anyone in the world.

So the idea that they produce a cleaner or flatter steel, I would reject.

Mr. FISH. Mr. Bozzone, you say that the current U.S. trade law is prospective in nature and does not provide injured companies, who may have been injured from dumping or subsidies, with compensation for their injuries. You endorse a private right of action legislative solution.

Some have argued that our current trade laws are sufficient to counter unfair foreign trade practices, but that they are not aggressively enforced by our Government agencies.

So my question, is it your opinion that regardless of how rigorously enforced our current trade laws are, that they nevertheless are insufficient to counter unfair trade practices?

Mr. BOZZONE. Yes, that is our point at this time, having filed two escape clause cases and two section 301 cases. We have utilized the trade laws; unfortunately, these trade laws have not resulted in a termination of the type of dumping that we see in the marketplace today.

When the relief periods end, dumping begins again. We have a situation today where dumping continues in our marketplace, but because we cannot prove injury, we are successful in our business, we are profitable; and since we cannot prove injury, we must stand by and watch the dumping continue until it reaches the point where we are financially harmed, and then we seek prospective relief for our problem.

But there is no relief for the dumping that has occurred over these many years and is occurring right now. And so some other form of action needs to be available to us to try and treat the symptoms of the demise of many companies in this industry. And we feel that the private right of action, and particularly the private right of action as defined in Senator Specter's bill is the type of relief that we need.

Mr. FISH. You were alluding to the voluntary restraint agreements when you said that as soon as the agreements terminate, imports would soar. So, do I take it from that that a return to voluntary restraint agreements and leaving them in force for perpetuity would not be a solution for you?

Mr. BOZZONE. Well, that certainly is a solution to the problem on a temporary basis, or has been on a temporary basis. If we left them in as a regular thing, then, yes, it would be a solution for us. But I think the private right of action is what we need. It is the ultimate weapon that we should have.

Unfortunately, under the voluntary restraint agreements, countries that subsidize and countries that do not subsidize—and we are not here to tell you that every country in the world subsidizes its steel industry or provides other assistance; some countries do not—those countries are limited in their access to the market as a result of the voluntary agreement just as the subsidizers are.

What we would like to do is have the ability to act against the specific country or companies that are dumping in our marketplace and take those people on and receive a remedy for that particular action.

Mr. FISH. Thank you.

Mr. Howell, on page 14 of your testimony you make the point that Americans do not know enough about anticompetitive combinations abroad and that, for example, the so-called East of Burma Agreement was not known even to the U.S. Government prior to recent filings by the U.S. steel industry.

You further make the point that the poor quality of information available to U.S. Government policymakers is not so much an indication that our Government can't get this information as it is that we have not placed a priority on obtaining it.

Now, other than the Federal Trade Commission publication which you mentioned in your testimony, can you tell us of any other substantial Government inquiry into this cartel theory; and if there is a lack of interest by U.S. Government agencies, can you tell us why you think this is the case?

Mr. HOWELL. Well, Congressman Fish, I can tell you that around the time that the antitrust laws were being enacted, and also the antidumping laws, the first two decades of this century, there were investigations like the FTC study done by the Congress, and by the FTC. Actually, I think the Democrats and Republicans commissioned their own studies into this issue, and there was attention to cartelization abroad and in the United States, and what the effect was. We were concerned that we were one of the big dumping countries ourselves. We had high tariffs in this country, and there was concern by consumer groups as to why we should pay a higher price here when foreign companies are paying less.

People looked at what was happening in the real world, and they wrote studies, and I would be happy to supply you with some of the materials that I have gathered on the subject. I think you see a trailing off of that fact-gathering in the last couple of decades.

The FTC did a study in 1977 of the competitive conditions in the world steel industry. There was a lot of looking at the comparative costs of the producers, but there was nothing that addressed the anticompetitive practices that were prevalent then.

They talked about the German industry, for example, but they didn't discuss the joint sales agencies and the rationalization groups. They didn't discuss the Japanese guidepost system. They didn't discuss the agreements that existed between the EC and Japan. They just didn't look at it. I think that you will find also, if you look through the data base that exists out there in government publications and what have you for information about this, you just won't find anything. It is just not there.

It is not to say that it couldn't be there. I think that it is the Government people that gather facts and access conditions abroad just haven't been pointed in this direction.

Mr. FISH. Mr. Howell, your testimony indicates you are not taking a position or any particular legislative solution to the shortcomings in current U.S. law.

As one who has dealt extensively with these laws, is it your opinion that our current countervailing duty and antidumping statutes are insufficient on that they haven't been implemented as they should be?

Mr. HOWELL. That is a hard question. They were not applied, in my opinion, properly this year in the steel cases. The ITC simply didn't apply the statutory standard.

Is that a problem with the law or a problem with enforcement? I would have to say it is a problem with enforcement.

I will say that the dumping law is the most effective tool that we have against the kind of problem that I have spoken to today, and it is a good law. It doesn't deal with the problem that both of the gentlemen, speaking on behalf of the steel industry, identified here. It is a prospective remedy only.

The U.S. steel industry lost $12 billion collectively in the 1980's. That money is gone regardless of what is done about dumping.

I think they are good laws if properly enforced, but they don't necessarily take care of the whole problem. Does that mean that the laws themselves need to be revised? Not necessarily. I think they need to be enforced properly. That is a point of departure. And we have to recognize the areas which they don't take care of.

The companies do not get compensated for past damage that they have suffered under any of the trade remedies.

Mr. FISH. Thank you very much.

Mr. Constantine, you have given a strong endorsement for Senator Metzenbaum's bill, S. 99, and you encouraged us to consider it. You also mention on pages 9 and 10 of your testimony that the goals of this legislation are similar to the overall objectives of GATT.

And my question to you is, if we were to amend the 1916 act as the bill contemplates, do you think it would be strengthening that law to such a degree that it would become susceptible to a challenge under GATT proceedings regarding the current grandfathered status of that 1916 act?

Mr. CONSTANTINE. Mr. Fish, I should note, as I said in my oral testimony, not only do I think that S. 99 is generally the right way to go, but also—H.R. 5348 is also the way to go. I do not think that either your bill or S. 99, Senator Metzenbaum's bill (anything is subject to challenge, because that is what we get paid to do as lawyers) but I don't think they are subject to a valid challenge of "disparate treatment" because the methodology both in H.R. 5348 and S. 99 is typical of the way a predatory prices case would currently be treated in the Federal courts.

The problem in the Federal courts right now is that there has never been a specific cost basis defined in the law of predatory pricing. Your bill does that. Senator Metzenbaum's bill does that.

Right now, we have a situation where the Supreme Court, I believe on six occasions, has refused to define a specific cost basis in a predatory pricing case. That is an invitation to the Congress to once and for all bring order out of this chaos. I don't think that this legislative enactment would properly subject such legislation to the charge of disparate treatment under GATT.

Mr. FISH. OK. Now, you are aware of the antitrust law section of the American Bar Association criticism, I take it, of S. 99. I am sure you are, for among other things, it premised private litigation against imports on the standard that no competition exists in a foreign market—and I won't quote anything further from their statement because I am sure you are very familiar with it.

Would you care to respond to this criticism of the legislation?

Mr. CONSTANTINE. I was part of the effort by the Bar Association to come to a position on this. At the time, I was chairman of the American Bar Association's Section 2 Committee, Section 2 of the Sherman Act of the Antitrust Law Section. My position obviously did not prevail.

I think the best that I can say is that I disagree with the final report. We fought it through. As I have stated in my written and oral statements, I believe that your bill and S. 99 are a sound, modest approach to this problem, consistent with the principles of competition law and consistent with sound economic principles, and not validly subject to a claim of disparate treatment. They would put American companies and foreign companies on the same basis.

Mr. FISH. Thank you.

Thank you, Mr. Chairman.

Mr. BROOKS. Mr. Scott, the gentleman from Virginia.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Howell, will you explain some of the ways in which steel competition is limited within a foreign market, for example, competition in Japan amongst Japanese steelmakers?

Mr. HOWELL. Yes, Congressman.

The way they do it in Japan is—as we understand it—the producers meet periodically and put forward their forecast of what they see as their sales, production, and so on. They put all of that on the table for the coming quarter.

There is then an attempt to forecast the demand in the market, and then there is an attempt to calculate a number, a production amount, that would allow there to exist a slight state of shortage in the domestic market. They agree on—a lot of times it requires that they reduce their production by a certain amount, and once that number is set, the Ministry of International Trade and Industry sets a guidepost, and they will publish a number saying, this is the total volume. And in order for the total volume to meet this guidepost, all producers are going to have to reduce their production by some amount.

And magically they do that. The Japanese will cut their production by a set amount.

Supposedly, that guidepost is just a voluntary guideline. In fact, though there is a huge amount of argument among the Japanese about what the guideline ought to be, if it is set too high, prices will drop and there will be too much steel on the market. And, therefore, there is it a lot of concern about where the guidepost should be set.

If you have that state of slight shortage, you always have the consumer chasing the last ton of steel that is not there. That is why imports are a problem; if you have a few tons of steel coming in that are not calculated in this mix, you suddenly find that there is more supply than demand, and the prices drop.

The European system works very much the same. The EC Commission publishes a forward program. They predict what the amount steel ought to be that is produced in a coming quarter. They publish that. And then they contact the individual steel mills and ask them, how are you going to adjust your production in order to comply with this guidepost?

And people will cut their production in order to bring their production into line with what the Commission has set. The objective is to create a slight state of shortage and firm up prices in the European market.

The reason they don't fix prices is that it is hard to monitor that. It is hard. It is easier to monitor production volume. And if they do want to run a cartel in those countries, it is easier to have agreements on what production should be than on prices.

Mr. SCOTT. Mr. Constantine, if U.S. firms engaged in those practices, would they violate any antitrust laws?

Mr. CONSTANTINE. Yes, they would violate the most basic, Sherman Act, section 1, and these alleged acts might rise to the level of violation of Sherman Act, section 2.

Mr. SCOTT. In your experience as an antitrust enforcer, what evidentiary and legal hurdles did you encounter in bringing a predatory pricing case against foreign defendants that are not encountered in bringing such a case against a U.S. defendant?

Mr. CONSTANTINE. One, obviously, was the issue that was raised by Chairman Brooks, the ever present potential defenses of, first, foreign sovereign compulsion, which is a possibility. The other is the argument that the use of the American antitrust laws violates principles of international comity, requiring American courts to meddle in the affairs of foreign governments. That is an obvious issue.

I don't think that those are insignificant issues. I think, in appropriate cases, principles of comity and principles of foreign sovereign compulsion might require an American court to decline to exercise jurisdiction, which it would otherwise have.

The other problem that is encountered is simply getting the evidence abroad.

For example, in the insurance case, which was decided by the Supreme Court in June, we had to send a team of lawyers to London for a significant period of time; for State governments, that was a significant financial problem. There was difficulty in getting evidence under foreign procedures. These are not, as you know, insuperable barriers. I think they are getting somewhat better.

As I previously testified, as other countries, our trading partners, adopt their own regimes of competition law and antitrust enforcement, they will be in the same spot, the same business, the same situation, and more amenable to the exercise of American antitrust law.

There is already significant movement in that direction in the European Community. And I certainly hope that the same will be true of our Asian trading partners, as well.

One of the things that the Bush administration did, which I think was an excellent idea, was send our antitrust officials to Asia, and particularly to Japan, to preach to them the gospel of antitrust enforcement. I think that effort was a good effort and met with some success. It was a long process, but it was certainly worth tackling.

Mr. SCOTT. Thank you.

Mr. Usher, to what extent and for what purposes does the U.S. domestic steel industry itself import steel?

Mr. USHER. It would vary from company to company, Congressman. United States Steel has imported very little steel; less than one-half of 1 percent over the last several years. Other companies have on occasion—when they have had outages of blast furnaces, major repair jobs, have imported slabs. This will vary from company to company and vary from year to year. It is not, I would say, a major practice on the part of most of the American steel industry.

Mr. SCOTT. And, also, some observers claim that competitive problems facing traditional steelmakers in the United States do not stem from unfair foreign practices, but from the wholesome, all-American competition of the up and coming minimills.

Do you have a response to that?

Mr. USHER. Again, I would disagree. I think these minimills, which are still a relatively small part of the flat rolled steel picture, operate under the same economic rules that we operate under. And the economics of their business, vis-a-vis our business, can change.

Several years ago scrap prices were cheap; they were probably a little more competitive than us. Today scrap prices are up; they are

less competitive than us. I would also say that we sell a full range of flat rolls products. We sell tin plate. We sell to almost every industry that is a consumer of flat rolled products. Minimills sell to a relatively small number of consumers.

The types of applications for our products are much broader than a company like Nucor's. So they are a competitor. There are times in certain markets they are a very dynamic and real competitor. But we really have no problem with that.

What we do have a problem with is a foreign country that is a wide supplier of a range of products coming in, and to gain entry into this market, dropping the price down to whatever it takes to get that order, even if that price has no relation to what they are selling for or what the cost of production was.

We also object to foreign countries that are subsidizing these companies that allow them to continue to engage in this type of practice. So I would reject the notion that new minimills are the problem. We compete with them. At times, there are going to be products and markets when they are more successful, and other times we are going to be more successful.

Mr. SCOTT. Mr. Bozzone, have you or other steelmakers ever brought antitrust cases against foreign rivals if you believe they are blocking competition in their home markets and targeting the U.S. market for predatory pricing, have you ever brought cases like that?

Mr. BOZZONE. No, we have not.

Mr. SCOTT. Mr. Usher.

Mr. USHER. No, we have not.

Mr. SCOTT. And why have you not brought antitrust cases against your foreign rivals?

Mr. USHER. I am not a lawyer. I am flanked by some who are probably more adequate to answer that, but it has been our legal opinion that these probably would not be effective means. And the ability to get relief under these laws—I guess, there was not confidence that that would be the case.

Mr. SCOTT. Mr. Bozzone.

Mr. BOZZONE. I would agree with that statement. That is the way we have been advised by legal counsel.

Mr. SCOTT. Mr. Constantine, do you want to make a comment?

Mr. CONSTANTINE. I think the crux of my testimony is that the antitrust laws should provide a remedy in this situation, but they don't because of a couple of problems.

One of the problems is the current interpretation of the doctrine of foreign sovereign compulsion. Another one of the problems is the current Supreme Court doctrine on the law of predatory pricing, which makes it virtually impossible to win a case like this in the international context, the most important example of that being the 1986 decision of the U.S. Supreme Court in *Zenith* v. *Matsushita*. It is traditionally the role of the legislative branch to address those kinds of defects.

I personally have been testifying on this issue for many, many years in both Houses, and I will continue to do so, hoping that you guys will get on the stick.

Mr. SCOTT. With that, Mr. Chairman, I don't have any further questions.

Mr. BROOKS. Mr. Goodlatte, another gentleman from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman. And I thank you for holding these hearings on this very important issue that I am very much concerned about. I have always been a proponent of free trade, but whenever I say that, I say that it must be fair trade; and I am concerned that the evidence seems to be that our remedies are lacking in terms of the ability to use our antitrust laws and our antidumping laws to provide a fair playing field.

However, Mr. Constantine, I am concerned about S. 99, Senator Metzenbaum's bill. Don't you think that that casts the net too broadly? Isn't that going to pick up on companies that are simply trying to establish a market for a new product that might lower that price as an introductory price?

Mr. CONSTANTINE. I don't think so, because built into that bill and the analog in the House are provisions that say that in addition to having charged below cost prices and in addition to operating out of a closed or trade-restrained foreign market there must, in addition to that, be injury to competition within the traditional meaning of the Clayton Antitrust Act, or the destruction or prevention of the establishment of a line of commerce within the traditional means of the antidumping laws, which have been on the law books for most of this century.

So beyond the mechanical parts of the law which say that if pricing is below cost and if it is happening from a trade-restrained or closed market, there has to be traditional trade injury or traditional antitrust injury.

With those safeguards built into these proposals, I do not think that the net is cast too widely, as you have suggested.

Mr. GOODLATTE. Thank you.

Mr. Howell, you haven't taken a position on S. 99. Can you tell me if you think there is going to be a problem, if that became law, in terms of that a private right of action similar to that set forth in S. 99 would be challenged as violative of GATT or specifically the GATT antidumping code.

Mr. HOWELL. I am not familiar with the specifics. The GATT answer is maybe yes, maybe no. You could design a private right of action remedy that would be inconsistent with the GATT, but I think that you could build one that would be consistent with the GATT.

As Professor Constantine has pointed out, whatever we do will be challenged in a GATT panel. Ultimately, how that will be resolved would remain to be seen. I think that one thing that we need to remember in dealing with the GATT is that we are dealing with countries, the same countries whose companies are engaged in this kind of behavior. They do not look kindly on the enforcement of our trade remedies, and one of the concerns that we have representing the steel industries is that these remedies will be picked to pieces by GATT panels. Not only a new private right of action but the existing remedies are being picked to pieces by GATT panels that are, in many cases, dominated by countries that are not looking kindly on the enforcement of our trade remedies.

So I think when you talk about GATT, you get into a broader problem that I think, to the extent we have allowed the GATT dispute settlement process to govern what our laws are, we are going

have a long-term problem down the road that is broader than just this legislation.

Mr. GOODLATTE. Mr. Constantine, you are familiar with that bill? How would you handle that problem?

Mr. CONSTANTINE. The basic argument that this would violate the national treatment provisions of GATT goes as follows: By setting a specific cost standard which would operate in the international context, that would be different than the standard which would be applied in the domestic context in a predatory pricing case.

But there is no standard in a domestic predatory pricing case because of the Supreme Court's refusal or failure to set a specific cost basis in the six cases that it has had before it. One thing that has happened in that vacuum is that 13 Federal circuit courts have adopted more than 13 standards; it is more like 25 standards. In the ninth circuit, there are four different standards.

So the argument that this specific cost basis which would be established in the international context is different than in the domestic context, the short answer is that there is no standard in the domestic context. There are 25 standards in the domestic context. Therefore, I think the argument is basically without substance.

All of the other dynamics in these bills follow a traditional methodology which would be applied in any predatory pricing case whether it be in the domestic or international context.

I didn't know you were going to ask this question, but I have written an analysis of this issue, and I will be glad to share it with you. It was part of the ABA process, which I think Congressman Scott adverted to before.

Mr. BROOKS. Would you submit that for the record, a detailed analysis. Could you have it prepared?

Mr. CONSTANTINE. I certainly would. The ABA didn't buy it, but maybe you will. Yes, sir, Mr. Chairman.

Mr. BROOKS. We may not either, you understand.

Mr. CONSTANTINE. It comes free, though.

[The information follows. Note particularly, section titled "Cost Basis for a Predatory Pricing Test in the Lower Federal Courts."]

"INTERNATIONAL FAIR COMPETITION ACT OF 1992"—S. 2610

INTRODUCTION AND SUMMARY OF THE ACT

S. 2610, the "International Fair Competition Act of 1992" ("the Act") sponsored by Senators Metzenbaum (Ohio), Simon (Illinois) and Brown (Colorado) would enact a hybrid antitrust-antidumping law by amending the dormant private treble damage provision of the 1916 Act, 15 U.S.C. 72.

The Act would authorize private treble damage actions on behalf of persons injured in their business or property by virtue of the sale, or export for sale, in the United States of articles below their average total cost, but only when the plaintiff can establish the existence of two other requirements. The articles must be exported from a foreign country whose market in the articles is non-competitive or closed to effective international competition *and* the below cost sales must be anticompetitive in the United States (within the meaning of the Clayton Act) or must destroy, injure or prevent establishment of a line of commerce in the United States.

In the export context, the Act would codify and set forth specific elements for the antitrust offense commonly referred to as predatory pricing. The Act would also specifically define a cost basis for a predatory pricing violation (in such context) an exercise which the Supreme Court has frequently suggested may be appropriate, but which it has so far declined to undertake.

Evaluation of the Act requires discussion of three issues. These are (1) the Act's substantive provisions; (2) its relationship to other legal authorities analogous to its substantive provisions; (3) the desirability of the Act's objectives and the likely effectiveness in fulfilling those objectives.

S. 2610 WOULD TO CREATE A PRIVATE ANTITRUST REMEDY FOR PREDATORY PRICING ACTIVITY EMANATING FROM FOREIGN COUNTRIES WITH CLOSED OR NON-COMPETITIVE MARKETS

S. 2610 would enact a private antitrust remedy for injury suffered because of predatory pricing of articles exported into the United States from countries whose markets, for such articles, are closed to effective international competition or non-competitive. The Act's sponsors implicitly accept virtually every premise of settled antitrust law relating to predatory pricing. The Act also embraces the ideology of an antitrust approach to the issue of predation by competitors based in foreign countries in contrast to a political, trade sanctions or managed trade approach.

The Act accepts the premise that open competition and free markets produce high quality goods at low prices and encourage technological innovation. The Act supports and intends to foster enactment and vigorous enforcement of strong competition laws by our foreign trading partners. Such actions would preclude successful enforcement of the Act by its very terms.

The Act accepts the premise that for pricing to be truly predatory, rather than just legitimate competitive low pricing, it must fall below the producer's cost. While the Supreme Court has suggested, in a dictum, that predatory pricing may occur when prices are merely "below the level necessary to sell [the offender's] products," *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.* 475 U.S. 574, 585, n.8 (1986), the Court has inferred that pricing below some appropriate measure of cost is an acceptable standard in defining predatory pricing, though not necessarily the only element necessary to prove a case of price predation. The relationship between the "average total cost" standard of the Act and the various contrasting, and often conflicting, standards adopted by the federal circuits (and in some cases, among different panels within the same circuit) is discussed below, along with other elements of the offense defined by the Act.

The Act implicitly assumes that in the "long run," producers must cover both fixed and variable costs to break even, let alone operate profitably. A producer operating from a foreign market which is either closed to international competition or non-competitive, because it is cartelized or monopolized and no *effective* regime of domestic antitrust enforcement exists, can cover fixed costs in the home market and sell below cost in foreign markets for as long as such conditions prevail. The United States producers faced with such pricing behavior cannot, by definition, respond in kind in the closed or trade restrained foreign market, nor can they subsidize below cost sales in any foreign market with sales made in the United States. Both the vigorous antitrust enforcement regime in the United States and the fiercely competitive marketplace it has fostered, would preclude such a result. Faced with this economic reality, American firms will inevitably be driven from the market by sustained below cost sales subsidized by sales at supra-competitive prices in the closed and/or non-competitive foreign market.

The paradigm for this scenario, as openly expressed by the Act's sponsors, is the experience of the American television industry in the 60s, 70s and 80s. The inadequacy of the current antitrust law (or more accurately, the interpretation of those laws) as evidenced in the 1986 case *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.* 475 U.S. 574, is asserted by the Act's sponsors to be a major rationale for its passage. It would be futile to debate the merits of *Matsushita,* (a 5 to 4 decision which primarily concerned the appropriate standards for summary judgment in an antitrust case), in the context of this report on S. 2610. Despite the fact that *Matsushita's* continued influence and usefulness as a decisional guide has been called into question by both subsequent circuit court cases, *cite Petroleum Products,* and a recent Supreme Court decision, *Kodak,* the portions of that case relevant to the Act remain valid. In one such part of the opinion, the Court opined that a valid approach to defining predatory pricing would require pricing below some appropriate measure of cost. 475 U.S. at 585, n.8. The Court, however, declined in *Matsushita* and in the subsequent cases of *Cargill, Inc.* v. *Montfort of Colorado, Inc.* 107 S. Ct.484, ——— (1986) and *Atlantic Richfield Co.* v. *USA Petroleum Co.,* 110 Sup. Ct. 1884, ——— (1990) to specify what the (an) appropriate measure in a cost based standard should be. The Court expressed its concern that competitive low pricing might be confused with anticompetitive predatory pricing, and therefore required a plaintiff to present direct evidence of the pricing conspiracy in order to avoid summary judgment. 475 U.S. at 587.

Matsushita also teaches that a plaintiff suing under United States antitrust law "cannot recover antitrust damages based solely on an alleged cartelization of [a foreign] market, because American antitrust laws do not regulate the competitive conditions of other nation's economies." 475 U.S. at 582.[1]

The Act does not contradict any of the four relevant issues/inquiries common to the *Matsushita* decision and the substantive provisions and purposes of the Act. The Act does specify the measure of cost to be utilized by Courts in determining whether pricing is below cost, and thereby fulfills the traditional function of the legislative branch, an action which the Supreme Court has seemingly invited in this context, and has frequently invited when interpreting the antitrust laws.[2]

Therefore, although the Act does not contradict *Matsushita* nor is a debate about *Matsushita's* validity or viability particularly useful in analyzing the Act, the facts alleged by the plaintiffs in *Matsushita* provide one valid means for analyzing the Act. This is so because the Acts sponsors have used the demise of the American television industry as a prime example of why the Act is needed. Without deciding or entering into a debate of whether the facts alleged by the plaintiffs or as stated by the defendants were true, one can usefully keep in mind the well known allegations in *Matsushita* while analyzing whether the Act sets forth a sound framework for litigating claims of price predation emanating from closed or noncompetitive foreign markets.

A COMPARISON OF THE ACT WITH CURRENT ANTITRUST LAW APPLICABLE TO PRICING BEHAVIOR SUBJECT TO THE ACT'S PROVISIONS

As previously discussed, the Act does not overrule *Matsushita* nor any part of that decision. This contrasts for example, with pending bills designed to overrule two other recent Supreme Court decisions interpreting Section 1 of the Sherman Act. *Cite* RPM bill, *Monsanto* and *Sharp*.

Under current antitrust law, a plaintiff who, alleged that it was injured as a result of predatory pricing by foreign firms which subsidized "below cost" sales in the United States with supra-competitive pricing in non-competitive home market, would confront a variety of contrasting and often conflicting standards which prevail in the thirteen federal judicial circuits.[3]

COST BASIS FOR A PREDATORY PRICING TEST IN THE LOWER FEDERAL COURTS

Although the Supreme Court has declined to recede from its 1986 dictum that predatory pricing might consist of "pricing below the level necessary to sell [the offender's] products;" *Matsushita,* 475 U.S. at 585 n.8, virtually all of the circuits use a cost-based predatory pricing test. However, the law in the circuits varies as to the appropriate cost standard. The Second Circuit has essentially adopted the test proposed by Professors Areeda and Turner in their seminal 1975 Harvard Law Review article.[4] The Areeda-Turner test proposes that prices below reasonably anticipated marginal costs be deemed predatory, while prices at or above reasonably anticipated marginal costs be deemed non-predatory. Average variable cost[5] is used as a surrogate for marginal cost, which is often difficult to measure. By applying this test in *Kelco Disposal Inc.* v. *Browning-Ferris Industries,* 845 F.2d 404 (2d Cir. 1988), *aff'd on other grounds,* 492 U.S. 267 (1989) the Second Circuit re-affirmed the earlier holding of *Northeastern Telephone Co.* v. *AT&T,* 651 F.2d 76 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982) that "[p]rices that are below reasonably anticipated marginal cost, and its surrogate, reasonably anticipated average variable costs, are presumed predatory." 845 F.2d at 407. The Court did not explicitly state that the presumption could not be overcome, but its reliance upon the Areeda-Turner test suggests that the presumption is conclusive. In contrast, *Northeastern* clearly indicates that prices above average variable cost will never be deemed predatory.

In contrast, the Fifth Circuit has adopted several cost standards which vary depending upon whether there are high entry barriers in the relevant market. In *Adjusters Replace-A-Car* v. *Agency Rent-A-Car Inc.* 735 F.2d 884, 889-90 (5th Cir. 1984), *cert. denied* 469 U.S. 1160 (1985), the Court determined that prices above average variable cost, but below average total cost, may be deemed predatory when there are substantial barriers to entry. Under such circumstances "a price above average variable cost might enable a monopolist to drive an existing competitor out

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[1] But see FTIAI and recent change in U.S. DOJ Guidelines for International Operations.

[2] Cite *Topco* and *Jefferson Parish.*

[3]

[4] Areeda and Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975).

[5] Average variable cost is the sum of all costs that vary with output divided by output.

of the market, whereafter the entry barriers would enable the monopolist to realize substantial monopoly profits." *Id* at 889.

The duality of the Fifth Circuit's standard was also reflected in the earlier case *International Air Industries* v. *American Executive Co.* 517 F. 2d 714 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976). In that case, the Court adopted the Areeda-Turner test but alternatively indicated that pricing below the short-run profit-maximizing price (a price which could be above average variable cost or above average total cost) might be predatory when barriers to entry are extremely high.

Different panels of the Ninth Circuit have adopted various contrasting cost standards for predatory pricing. These cover the spectrum from below average variable cost to above average total cost. In *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.* 668 F.2d 1014 (9th Cir. 1981) *cert. denied,* 459 U.S. 825 (1982), the Court ruled that a plaintiff establishes a prima facie case of predatory pricing when the defendant's prices were below average variable cost. Prices above average variable cost and below average total cost might be held predatory "when the justification of these prices is based, not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his loses." 668 F.2d at 1035. See also, *Marsann Co.* v. *Brammal, Inc.* 788 F.2d 661, 614 (9th Cir. 1986). *In Transamerica Computer Co.* v. *IBM,* 698 F.2d 1377, 1388 (9th Cir. 1983), *cert. denied* 464 U.S. 955 (1983) the Court went further and held that prices above average total cost may be deemed predatory upon clear proof of predatory intent.

Ninth Circuit panels in earlier cases had endorsed pricing at or above marginal cost as consistent with hard competition on the merits. *Janich Bros.* v. *American Distilling Co.* 570 F.2d 848, 857 (9th Cir. 1977), *cert. denied* 439 U.S. 829 (1978); *California Computer Products. Inc.* v. *IBM,* 613 F.2d 727 (9th Cir. 1979).

The Ninth Circuit has not only vacillated on the appropriate cost standard in predatory pricing cases, ultimately declaring in *Inglis* that rigid adherence to any particular cost standard is wrongheaded, 668 F.2d at 1035, but has also shifted from case to case on the relevance of other factors, such as intent and the probability of recoupment. Examination of the Ninth Circuit's predatory pricing cases alone, should rebut any assertion that there is currently anything resembling a consistent predatory pricing standard in the federal courts or that a foreign company subject to the Act's provisions could justifiably claim that the Act violates the national treatment requirement of the GATT. Indeed, the predatory pricing definitions adopted in several Ninth Circuit cases is consistent with the approach adopted in the Act.

The Eleventh Circuit's rule announced in *McGahee* v. *Northern Propane Gas Co.* 858 F.2d 1487 (11th Cir. 1988), *cert. denied* 490 U.S. 1084 (1980) squarely adopts the average total cost standard which is the cost basis adopted in the Act. In *McGahee,* the court made predatory intent, rather than objective cost criteria or recoupment theory, the center of its approach to predatory pricing. In this approach, pricing above average variable cost but below average total cost is circumstantial evidence of predatory intent. This circumstantial evidence must be supported by other subjective or objective evidence of predatory intent, the quantity of which must increase the closer pricing is to average total cost.

Similarly, the Sixth Circuit has held that pricing below average total cost must be shown before Sherman Act liability may be premised on predatory pricing. *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.,* 927 F.2d 1050 (6th Cir.) *cert. denied,* 469 U.S. 1036 (1984). The Sixth Circuit's analysis closely tracks that of the Ninth Circuit in *Inglis* but declines to follow the Ninth circuit's extension of *Inglis* in *Transamerica,* which held that even prices above average total cost could be predatory.

The First Circuit also closely follows one iteration of the Ninth Circuit's rule, holding that pricing below average total cost must occur before the court will engage in further analysis of whether predatory pricing has occurred. *Barry Wright Corp.* v. *ITT Grinnel Corp.,* 724 F.2d 227 (1st Cir. 1983).

In *Henry* v. *Chloride, Inc.,* 809 F.2d 1334 (8th Cir., 1987) a price discrimination case, the Eighth Circuit adopted a hybrid of the First circuit's decision in *Barry Wright Corp.* and that part of the Ninth Circuit's rule articulated in *Inglis.* When prices are below average total cost but above average variable cost, a rebuttable presumption exists that prices are non-predatory. Pricing below average variable cost creates a rebuttable presumption of price predation. 809 F.2d at 1396.

In *Instructional Systems Development Corp.* v. *Aetna Casualty & Surety Co.,* 817 F.2d 639 (10th Cir. 1987), the Tenth Circuit, joined what appears to be a plurality, if not a majority, of the circuits in their admiration for, but ultimate rejection of, the Areeda-Turner test. The Tenth Circuit considers the relationship between price and average variable cost to be a useful tool, but holds that prices above average

variable cost do not preclude a finding of predatory pricing if other factors indicate "unreasonably anticompetitive behavior". 817 F.2d at 648.

In *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.) *cert. denied* 464 U.S. 891 (1983), the Seventh Circuit unsurprisingly adopted a cost-based predatory pricing standard which is the most heavily economic and didactic among the circuits. In *MCI*, the Seventh Circuit opines that when prices are at or above average total cost, an inference of predatory intent should be presumed or inferred. However, the court explained that average total cost should not be equated with fully distributed cost but with long run incremental cost which, for a multi-product firm, more accurately segregates costs related to the particular goods subject to the claim of price predation. 708 F.2d at 1122-23.

In the subsequent case of *A.A. Poultry Farms* v. *Rose Acre*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990), Judge Easterbrook shifts the analytical emphasis away from a cost-based standard to one in which market structure and the probability of recoupment is a threshold inquiry. If analysis of the market structure indicates that recoupment of profits, lost through low or below cost pricing, has not and will not occur, the Court need not analyze either cost-price relationships or evidence of predatory intent. 881 F.2d at 1401.

The review of the circuit court decisions and the Supreme Court's consistent refusal to define either the cost basis or other elements of a predatory pricing violation leads to a clear conclusion. There is no single definition of predatory pricing under the federal antitrust laws nor a single rule for the cost-price component which most, but not all, federal courts use as part of their analytical framework.

The rules which have been announced by the various circuits, and often by different panels in the same circuit, utilize a combination of elements. Those elements include cost-price comparisons, predatory intent, and analysis of market structure, including entry barriers and probability of recoupment.

Several subsidiary conclusions relevant to the analysis of the Act flow from examination of this patchwork of predatory pricing definitions. First, the Act's predation standard, which requires several elements in addition to below cost pricing, is typical of the circuit court decisions.

In addition to pricing below cost, the Act requires a finding that the defendants operate from a closed or non-competitive market and also requires either a finding of injury to competition (in Clayton Act terms) or injury to competitors (similar to standards under the anti-dumping laws).

In particular, the requirement that violators operate from a closed or trade restrained foreign market would mesh with the analysis of both market structure and intent which many federal courts have considered relevant in predatory pricing cases. When a foreign competitor is able to cover fixed costs and subsidize below cost sales with supra-competitive prices in the closed home market, the requisite market structure exists for destruction of a United States based competitor, which has no analogous deep pocket. A long term pattern of such discriminatory pricing may also mesh well with the objective predatory intent inquiries which certain courts have undertaken. *McGahee*, 858 F.2d at 1503.

Second, the cost-price standard adopted in the Act, i.e., pricing below total cost is necessary though not sufficient to establish a violation, is similar to that adopted in many of the circuit decisions. In fact, the line drawn by the Act is the one most frequently adopted by the circuits.

Third, although it is inevitable that the Act will be criticized and challenged as violating the "national treatment" provision of the GATT, a comparison of the Act to current treatment of predatory pricing under the antitrust laws shows that the assertion of less favorable treatment is without merit. It is likely that under current antitrust laws, allowing for the confused state of predatory pricing doctrine, that a claim analogous to one which could be made under the Act would not be treated more favorably.[6]

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[6] As an example, consider a domestic firm operating from a state where entry into a market is restricted due to regulation. This firm subsidizes below price sales in a neighboring state with supra-competitive prices in the regulated state. The antitrust analysis of this behavior would closely track the framework set out in the Act. This scenario was typical of the New York State milk market until 1987 when the passage of the New York Milk Control Law of 1987, opened the New York market. Until then virtually no entry into the regulated New York wholesale fluid milk market was permitted because any potential entrant had to show that entry would not tend to "destructive competition." Destructive competition was statutorily defined as any additional supply of milk in a market already adequately served. Adequacy was measured solely in terms of available supply of milk and no consideration of price was permitted. Licensed New York dealers (who had obtained their licenses prior to the Depression) systematically charged supra-competitive prices and engaged in a pattern of price-fixing in New York. Despite addi-

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THE ACT IS DESIGNED TO OPEN CLOSED FOREIGN MARKETS TO U.S. EXPORTS AND ENCOURAGE THE ADOPTION AND ENFORCEMENT OF STRONG COMPETITION LAWS

Firms operating from markets which have effective price competition and which are open to foreign competitors have no exposure under the proposed Act. This is the case regardless of whether their prices in the United States are below average total cost, average variable cost, marginal cost or any other measure of cost adopted by American courts in defining the elements of a predatory pricing violation. This remains the case even when such below cost sales result in injury to competition (within the meaning of the Clayton Act) and/or destruction of United States competitors. Under the Act, a United States firm with effective access to a foreign competitive market simply has no cause of action, no shield for inefficiency and no sword to combat foreign price competition, even when foreign competitors act with predatory intent.

The Act has two clear legislative objectives. Countries exporting goods into the United States are given strong incentives to open their markets to foreign competitors and to foster effective price competition, through the adoption and enforcement of strong competition laws. The merit of these objectives is hardly worth debating. They are the basis of every major trade and international antitrust initiative which the United States has pursued over the last several decades. These objectives are the basis of the much publicized Structural Impediments Initiatives ("SII") involving the Japanese and United States governments. Similarly, the lowering of trade barriers is the overall objective of the GATT. Sir Leon Brittain, the United Kingdom's chief antitrust enforcer, has predicted that the primary objective of the next round of the GATT will be the adoption and harmonization of strong national competition laws.

The Act's objectives are also echoed in the recent report of the American Bar Association's Special Committee on International Antitrust, which endorsed the adoption and enforcement of strong national competition laws throughout the world.

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Although the dual objectives of opening foreign markets and fostering price competition, through the adoption and enforcement of strong antitrust laws, are undoubtedly desirable, the question remains whether the proposed Act is well suited to foster these objectives.

THE FEDERAL TRADE COMMISSION'S ROLE UNDER THE ACT WILL LIKELY VITIATE THE ACT'S EFFECTIVENESS

The Act directs the Federal Trade Commission ("FTC") to issue guidelines defining several crucial predicate conditions and terms under the Act, within 180 days of its enactment. Specifically, the FTC is directed to "describe conditions that constitute a foreign market substantially closed to effective foreign competition" and to "prescribe standards for determining the average total cost of articles." The FTC is also given the authority to define any other term which it deems necessary to implement the Act's provisions.

The FTC's role under the Act involves powers and duties which it probably does not want nor is well suited to perform. It will put the FTC in the unenviable position of clashing with the Office of the United States Trade Representative ("USTR"). To avoid this conflict the FTC may use its broad powers of definition to interpret terms of the Act in a manner which would render the Act ineffective.

The USTR has been granted Cabinet level status and a broad mandate under Section 301 of the Trade Act of 1974[7] to take actions aimed at eliminating barriers to the export of United States goods and services. Under the Omnibus Trade and Competitiveness Act of 1988,[8] both Section 301 and the USTR powers thereunder were significantly broadened. The USTR now is required to investigate "actions which are alleged to be "unjustifiable", "unreasonable" or "discriminatory", make findings of violations and institute retaliatory actions for certain violations of Section 301. Export targeting by forcing countries, interference with United States exports by foreign cartels and practices which deny American companies "fair and equitable" access to foreign markets are all action within the purview of Section 301 and the USTR's powers.

In the exercise of its role of defining conditions which constitute a "foreign market substantially caused to foreign competition", the FTC is likely to be drawn into con-

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tional transportation costs, they sold milk in New Jersey at well below their New York prices, and according to state regulators in New Jersey, at below cost.

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flict with the USTR on two levels. First, the FTC's abstract view of which conditions constitute a closed foreign market may well conflict with the viewpoint of the USTR. In specific cases arising under the Act, the FTC's role in laying the basis for a private treble damage action may cause further conflict between the FTC and the USTR.[9]

For these reasons the FTC is likely to resist the role designated for it in the Act.

A better approach to the issue of promulgating definitions and conditions necessary for enforcement of the Act, would be to shift to the USTR powers presently granted to the FTC. A second approach would be to adopt specific formulations in the Act itself.

The office of the USTR should have the most relevant skills and background of any organ of government to fulfill the role presently assigned to the FTC under the proposed Act. Substituting the USTR would also avoid the inevitable interagency conflict which would otherwise ensue.

An argument can also be made for adopting specific definitions, conditions and standards in the Act itself. One criticism of the current mechanisms for combating unfair, unjust and discriminatory practices which are covered by Section 301, and which would be predicates for private actions under the proposed Act, is that they fail because of government involvement. The federal government is frequently criticized for lax enforcement or for compromising the interests of American industry because of the need or desire to act in a manner which is politically expedient.

For example, it has been documented that the United States government never collected the bulk of the dumping duties which had been assessed against Japanese consumer electronics firms as a result of the government dumping cases which arose out of the same course of conduct which spawned the *Matsushita* antitrust case and the related *Japanese Electronics Products* under the 1916 Act.[10]

One viewpoint is that strong private enforcement will be more successful than politically infected government initiatives in addressing the practices which are covered under the proposed Act.

The Antitrust Section need not opt for a specific change in the proposed Act but may note that the present formulation is unlikely to be effective because of the FTC's crucial but ill conceived role.

Mr. GOODLATTE. Mr. Usher, I was interested in your comments about your ability to sell to Japanese automakers in the United States parts that you cannot sell to them in Japan. What do you say to those people who argue that that is actually to the benefit of the United States, because if steel prices were lower in Japan for the same items, more of those cars would be manufactured in Japan rather than in the United States?

Mr. USHER. Well, I think, in general, there are going to be times when if you have distortions, one set of consumers will be benefited over another. But I think ultimately, if there is free and fair trade, those producers who are most efficient and those that can turn out the quality product for the lowest cost will be the winners and ultimately the consumer will be the benefitor.

The idea that we are going to allow foreign competition to bring product in here which is below their cost of production because our consumer will benefit, I would reject that. I think fair and open trade will allow those that are most competitive to rise to the top.

Mr. GOODLATTE. In this case, the argument is that our manufacturer, namely you, benefits by the ability to reach that market here in this country, and the incentive it provides to Japanese companies to locate their businesses in this country because the prices are cheaper here.

Mr. USHER. But I would also say if we were able to sell to Japan at the same prices we are selling today, it would allow us to be that much more competitive and our consumers and the Japanese consumers would benefit.

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Mr. GOODLATTE. Very good.

Thank you, Mr. Chairman for the time. You have been more generous than the floor has. We have 8 minutes left.

Mr. BROOKS. I want to thank all of our witnesses for their useful and informative testimony.

A vibrant steel industry is one of the cornerstones of any advanced industrial society. That the United States has recovered from its competitive edge in steel, yet may still be foreclosed from market expansion because of anticompetitive agreements, is unacceptable, plain and simple.

That is the word both the Europeans and Japanese used recently in dismissing American calls for change. They said it would be simply "unacceptable." They happened to come up with the same thought in Japan and in Europe.

I fully realize that the current steel dumping proceeding conducted by the ITC is on appeal. We will not interfere with the appellate process in that proceeding, but that does not mean that we will defer exercising our oversight and investigative responsibility. I intend to press this matter forward with the U.S. Trade Representative and the Justice Department to determine whether the executive branch has really awakened from its stupor of the past 12 years and is now willing to strike hard against possible cartel activity and unfair trading practices by our foreign trading partners.

Depending on the responses we receive, the committee may well have to conduct its own independent inquiry. In any event, I am now considering introducing legislation to try to make sure that the antitrust laws are not unduly thwarted in the international arena by foreign countries and companies doing business in the United States.

The meeting is adjourned. Thank you all.

[Whereupon, at 12:10 p.m., the subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Prepared Statement of Hon. John P. Murtha, a Representative in Congress From the State of Pennsylvania, and Chairman, Congressional Steel Caucus

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify before your Subcommittee as Chairman of the Congressional Steel Caucus. We currently represent 97 Members of the House of Representatives and are continuing to grow. Far more importantly, we represent many tens of thousands of families who depend on the steel industry for their livelihood, and depend on Congress to ensure that there are adequate safeguards against unfair trade in our market.

Today, you will hear testimony from industry representatives who will tell you how the industry has become truly world-class. As a result of tens of billions of dollars in investment, and sustained effort and sacrifice by its work force, the industry has become the high-quality, low-cost producer for this market. Despite this dramatic turnaround, however, the industry is not prospering by any means. The industry's work force continues to contract at an alarming rate. During each of the past two years, the industry has incurred multi-billion dollar losses.

The reason for this is obvious. Unfair trade in the marketplace by foreign producers and importers of flat-rolled steel has taken place on a scale unprecedented in our nation's history. This not just our opinion. After an intensive investigation extending over one year, the Commerce Department this summer found that twenty countries exporting flat-rolled steel to this country were guilty of dumping and subsidization on a truly massive scale, with the average margin of unfair trade amounting to thirty seven percent.

Furthermore, this is not a recent development. We are an industry that has been battered by such unfair trade practices for more than a decade. For far too long, the United States has been the dumping ground of choice for foreign companies who have maintained a huge excess capacity that would not continue to exist if free market forces were allowed to operate. The United States market for steel is large, and is by far the most open in the world. Dumping and subsidization have enabled foreign producers to take and hold a significant and increasing share of that market.

In the summer of 1992, the industry filed trade cases with the Commerce Department and the International Trade Commission that were intended to put a stop to that. The results have not been satisfactory.

The Commerce Department did its job, confirming after painstaking investigation that the industry's complaints about unfair trade were amply supported by hard evidence.

However, the International Trade Commission found that a substantial percentage of this unfair trade was not a cause of any injury to the industry. Although the Commission determined there was injury in a large percentage of the cases involving steel plate and corrosion-resistant steel, it concluded that only thirty-five percent of the volume of imported cold-rolled steel was injurious, and that none of the imported hot-rolled steel, which amounted in 1992 alone to over three million tons of steel valued at more than a billion dollars, was harmful to the industry. This in my estimation is an astounding and inexplicable result.

As I stated at the beginning of my testimony, the injury that the industry is suffering is unmistakable. It is evident in thousands of lost jobs and alarming losses to domestic companies.

Additionally, under law that must govern the Commission's deliberations, an industry is entitled to relief from unfair trade practices if the evidence shows that unfairly traded imports are a cause of injury to that industry, meaning, such imports are contributing to such injury, even though other factors may also be contributing to the injury. Yet, the Commission inconceivably found that huge quantities of imported hot-rolled and cold-rolled steel have not contributed to the industry's distress.

Let me share with you a few examples of findings which were made by the Commission that are difficult to comprehend. In 1992, Japan exported more than $230 million of cold-rolled steel to this market. The Japanese held a 2.7 percent share of this market during the year. The Commerce Department found that Japanese cold-rolled steel was sold in this market at heavily dumped prices, with the average dumping margin amounting to forty-five percent. The Commission found that this did not even contribute to injury in the domestic industry.

Similarly, in 1992, huge quantities of unfairly traded hot-rolled steel were imported from Canada. During that year, the Canadian share of our hot-rolled market was a full five percent. The value of these imports was well in excess of $300 million. The Canadian dumping margin, as determined by the Commerce Department, was thirty-two percent. The Commission's conclusion, again, was no harm of any kind from these imports.

I could go on and on, but I think my point is obvious. If the Commission had followed the law, I do not believe that it would have been possible for it to have arrived at such outrageous conclusions.

Although I realize that this Committee does not have direct jurisdiction over the Commission, nonetheless, given the unreasonableness of the Commission's rulings in these cases, I would support any legislation that you or any other Committee may propose that would force the Commission to apply the law fairly and ensure that the Commission fully appreciates the seriousness of its task. In addition, I believe we should also consider alternative means of stopping unfair trade in our market, including a private right of action in antidumping and countervailing duty cases.

Again, Mr. Chairman, I appreciate this opportunity to offer my testimony on behalf of the Steel Caucus and thank your for your consideration.

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